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Sup. Ct

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE STATES OF NEW YORK, DELAWARE, ET AL.,
APPELLANTS
v.
THE UNITED STATES OF AMERICA, ET AL.

THE HONORABLE HORACE A. HILDRETH, GOVERNOR
OF THE STATE OF MAINE, ET AL., APPELLANTS
v.
THE UNITED STATES OF AMERICA, ET AL.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, ET AL., APPELLANTS
v.
THE UNITED STATES OF AMERICA, ET AL.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK*

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 1411) is reported in 65 F. Supp. 856. The report of the Interstate Commerce Commission (R. 62, 433) is set out in 262 I. C. C. 447, 264 I. C. C. 41.

JURISDICTION

The judgment of the District Court was entered on May 27, 1946 (R. 1450). Petitions for appeals were filed and allowed on June 25, 1946 (R. 1465, 1474, 1483). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220, 28 U. S. C. 47a.

QUESTION PRESENTED

Whether the Interstate Commerce Commission exceeded its authority in ordering a 10 per cent decrease in railway class freight rates for all interstate shipments throughout the United States east of the Rocky Mountains, except for shipments within the northeastern area of the United States, and in ordering a 10 per cent increase in railway class freight rates for all interstate shipments within the northeastern area of the United States, and as an interim measure pending the bringing about of national uniformity in the classification of freight, and a greater degree of national uniformity throughout the United States in the class freight rate structures, based on findings that these changes are necessary in order to eliminate unreasonableness and undue discrimination in classifications and freight rates, in violation of Sections 1 and 3 of the Interstate Commerce Act.

STATUTES INVOLVED

Sections 1, 3, 13, 15, and 15a of the Interstate Commerce Act of 1887, as amended, and the Transportation Act of 1940, in their pertinent provisions, are reproduced in Appendix A, pp. 258–266 *infra*.

STATEMENT

THE PROCEEDINGS BELOW

These reports and orders resulted from two separate investigations instituted by the Interstate Commerce Commission on its own motion on July 29, 1939, Docket No. 28310 entitled "Consolidated Freight Classification," and Docket No. 28300 entitled "Class Rate Investigation, 1939," to inquire into the lawfulness or unlawfulness of the then existing rate-making standards for railroad[1] interstate class freight rates in the United States (R. 55, 57). The *classifications* inquired into in No. 28310 are the descriptive lists of all commodities moving by rail freight, which include the class or rating for rate-making purposes to which each commodity has been assigned, together with the various rules and regulations governing freight shipments. The *class rates* inquired into in No. 28300 are the rate schedules or scales which, by application to them of the classification ratings, make the actual class rates. Both investigations covered the entire United States except that the area west of the Rocky Mountains was excluded from the class rate investigation.

---

[1] Interstate rail-and-water and all-water rates and classifications were also involved in the investigation orders, but were later eliminated from consideration (R. 130).

All the railroads in the United States subject to rate regulation were made respondents, and all the States were given notice and invited to participate.

Because freight classifications and class rates are so closely interrelated and interdependent, and because of the emphasis in both investigations on the desirability of national uniformity in the method of making freight rates, the two investigations were immediately consolidated, heard together as one case, and made the subject of a single report (R. 62) by the Commission, which contains elaborate findings and conclusions, and specific directions to the railroads aimed at the uniformity found to be essential. Because the Commission realized that a new, uniform classification would take time to prepare, and because the revised class rate structure was realized to be dependent upon the new classification, the only order the Commission issued was an interim order (R. 383) designed to alleviate temporarily the existing unlawfulness in the classifications and class rates, pending the complete elimination of that unlawfulness in the manner prescribed in the report. This order, which called for a decrease of 10% in class rates in the South and West, and interterritorial class rates, and an increase of

10% in class rates in the East, was entered in No. 28300 only, but the order did incorporate, by reference, the single report of the Commission, filed to dispose of both proceedings, which is the subject of attack in appellants' petitions (R. 1, 28–35, 833, 845–59).

The Commission held extensive public hearings at St. Louis, Missouri; Indianapolis, Indiana; Columbus, Ohio; and Washington, D. C., in 1941, 1942, and 1943. A committee of State Commissioners participated. In January of 1940, a notice was issued to all the common carriers involved and to the public, outlining the scope of the investigations and suggesting that everyone interested assemble whatever data might be deemed relevant, and, at the same time, the common carriers involved were all ordered to compile and furnish certain traffic data and classification information. In October of 1940, a pre-hearing conference was called to define the issues and facilitate the presentation of proof. This conference was attended by more than 400 persons and resulted in the rescission of the order to compile traffic data, because of opposition from the carriers and other persons (R. 70). After the hearings were concluded, extensive oral arguments were had in June of 1944, and a great many written briefs were submitted. The Commission gave the record and briefs exhaustive consideration for almost a year before filing its report and order in May, 1945.

Numerous petitions for reconsideration were filed and considered (R. 387; 416, 425, 434). On October 30, 1945, a modified report (R. 432) and order (R. 479) were filed, but the petitions for reconsideration were otherwise denied.

Illustrative of the fairness and conscientiousness of the Commission in these proceedings, which were recognized by it and the parties as probably the most important and comprehensive investigations ever undertaken by the Commission, was the fact that studies prepared by the Commission's staff were circulated in advance of the hearings and their presentation in evidence; and, after presentation, the Commission took advantage of suggestions made by the parties for revision or recalculation of these studies, so that no suggested line of inquiry that was feasible would be unpursued (R. 71, 203; Ex. 196, R. 11257-61, 4352). The approximately 5,500 pages of the record of oral testimony in these proceedings by no means indicate their comprehensiveness, because the exhibits, aggregating over 12,000 pages, constitute most of the meat of the case.

Almost 500 lawyers and other persons appearing in a representative capacity were participants of record in the Commission's proceedings (R. 65-69). Not only was the subject matter highly complicated; the proceedings themselves, because of the numerous interests involved, lacked the formality of a courtroom trial where each side presents its evidence in turn, within the limitations of fairly rigid rules administered by a single judge.

The new interim rates, involving the 10 per cent increases and decreases, were ordered to become effective on January 1, 1946, with a requirement of 30 days' prior notice (R. 806). On November 29, 1945, the northern States of New York, Delaware, et al., appellants in No. 343, filed their petition in the court below seeking to set aside the reports and orders of the Commission in their entirety, and seeking an interlocutory injunction pending the hearing and determination of the case (R. 1, 53). A special statutory three-judge court was promptly established (R. 487). The Governors of the six New England States, the appellants in No. 344, intervened on the side of the plaintiffs (R. 512), as did most of the western railroads, the appellants in No. 345 (R. 490). The Interstate Commerce Commission intervened on the side of the United States (R. 511), as did the southern States (R. 508), the Southern Governors' Conference (R. 508), the western States of Arkansas, Kansas, Nebraska, North Dakota, South Dakota, Oklahoma, Louisiana, Texas (R. 505) and Minnesota (R. 820), and their respective State Commissions, and the Southeastern Association of Railroad and Utilities Commissioners (R. 830).

On December 13, 1945, the statutory court heard arguments and received affidavits on the question of the issuance of an interlocutory injunction and on December 21, 1945, an interlocutory injunction issued (R. 805).

On February 18, 1946, the cause came on for hearing on the merits. Meanwhile, on February 1, 1946, a separate action seeking substantially the same relief had been filed in the same court by most of the western railroads, appellants in No. 345, the petition in that case containing generally the same allegations as those in the petition in the original case, and, in addition, an allegation that the new rates established by the Commission were, in part, confiscatory (R. 833). The two cases were consolidated and tried together, the trial lasting from February 18 through February 21, 1946. Over the objection of appellees, evidence was introduced by the western railroads seeking to establish their confiscation allegation (R. 894–937). At the conclusion of the trial on February 21, the court took the cases under advisement (R. 937).

On May 9, 1946, the court filed a unanimous written opinion upholding the orders of the Commission in all respects and adopting all the Commission's findings of fact (R. 1411). The final decree was filed on May 27, 1946 (R. 1450). It contained a provision continuing the interlocutory injunction for 60 days, and thereafter until the final determination of the case on appeal if an appeal had been perfected by the end of the 60-

day period. On June 10, this Court denied the Government's motion to dissolve the stay.

The findings of the Commission and the solution adopted on the basis of the findings are unintelligible without some fairly detailed analysis of the present highly complicated and technical system of rate making. Therefore, even though it means the sacrifice of brevity, a substantial segment of this brief is given over to an explanation of the existing system of making railroad freight rates, so that this Court may have a clear idea of the situation with which the Commission was obliged to deal, which prompted its orders of investigation and motivated its choice of remedies.[2] This analysis of the present system will deal, first, with the freight classifications, and then with the class rate structures. After describing this background or setting, the findings of the Commission will be reduced to their essence. In the argument, the evidence supporting each of the six major points made by the Commission in support of its findings will be dealt with separately.

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[2] The discussion of class rates in the Commission's report is much more lengthy and complicated than the analysis in this brief, and comprises the great bulk of the 160,000-word report (R. 62–381). Much of this discussion deals with minute details of the class rate structures and is highly technical. One purpose of this brief has been to try to simplify this subject, at least to some extent, and thus save the Court the labor of a detailed analysis of the entire report of the Commission. The following 50 pages are far shorter and less involved than any other description of the existing rate structures and rate-making process that has been discovered, including the descriptions in the Commission's report. It is impossible to make such a complicated, chaotic situation seem logical or simple, and it is hoped that the Court will agree with counsel that this section of the brief is indispensable to a full understanding of what the Commission was trying to accomplish.

THE EXISTING SYSTEM OF MAKING RAILROAD FREIGHT RATES

(1) *Relationship between classifications and class rates*

For a variety of reasons, some obvious and some rather nebulous, railroads charge different prices for handling different commodities. Since many thousands of different commodities are handled, it has traditionally been found convenient to group them into classes, those commodities in each class paying the same freight rate per 100 pounds. If freight rates increased in arithmetical progression by distance and volume, i. e., if the price for a 100-mile shipment were always ten times the price for a 10-mile shipment, and if the price for shipping 50,000 pounds were always ten times the price for shipping 5,000 pounds, regardless of method of packing, etc., the publication of freight rate tariffs would be relatively simple. If these conditions applied, the freight tariffs could consist merely of lists of the commodities assigned to each class, and the rate per mile for transporting 100 pounds of any commodity in each of the classes. However, none of these conditions exists; therefore, to avoid the necessity of publishing gigantic tariff publications containing every charge for every different commodity for every possible distance and for every possible volume and packing, one class of commodities has been designated as the standard class and called first class, or Class 100 (100%), and each other class has been fixed as a percentage, or a multiple, of first class. The kind of freight classification involved in this proceeding consists, then, of a list containing a description of every commodity moving by freight, and the class or classes to which it is assigned, i. e., its classification rating or ratings[3] (one commodity usually has more than one rating, depending upon volume and conditions of shipment), each rating indicated by a number, letter, or number-letter symbol. In the classification is also a statement of the regulations governing the carrier-shipper relationship, packing specifications, and minimum weights applicable to freight shipments. This whole document is called the classification.

Neither the classification nor the individual ratings in it tells the shipper what he must pay for any shipment. The cost of shipment will depend on the *class rates*, which, although subject to numerous and complex variations, are published separately in the form of a schedule containing the price per 100 pounds for moving *first-class* freight each possible distance it may be moved. Thus, to find out what a given shipment moving on class rates will cost, the first step is to look up the article in the classification, discover its classification rating therein (for the volume and under the conditions involved), then to look in the class rate tariff for the cost of shipment for the distance involved per 100 pounds at the first-class rate, and then to apply the percentage rating to the first-class rate. This is over-simplification, but it shows the relationship between the *classification*, the *rating*, the *class rate*, and the *cost of shipment*, and what each of these terms means as used in this brief.

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[3] Which assign the articles to standard percentages of first class.

(2) *Freight classification ratings*

A classification serves two purposes: First, as the pattern for the whole rate structure, classification being the foundation or cornerstone of rate making; and second, to prescribe ratings fixing the percentage of the first-class rate to be paid for the actual movement of class rate freight traffic. *Suspension of Western Classification*, 25 I. C. C. 442 (1912). Classification undoubtedly originated as a convenience both to carriers and to shippers, but because of its importance, Congress in the original Interstate Commerce Act made classification a legal obligation. Section 1 (4) of the Act provides that it shall be the duty of the common carriers to establish just and reasonable classifications applicable to freight rates and charges, and Section 1 (6) prohibits every unjust and unreasonable classification. Section 3 (1) prohibits discrimination in classification. Section 15 (1) requires the Commission to prescribe just, fair and reasonable classifications, after a finding that existing classifications are unlawful.

All of Part I of the report of the Commission (R. 62, 71–127) is devoted to the *Consolidated Freight Classification* case, Docket No. 28310; and the Commission's conclusions and ultimate findings on this subject (R. 116–127). Appellants in their petitions have attacked these classification findings (R. 1, 28–30, 833, 843, 848–9) and the necessity of meeting this attack is one reason why classification is dealt with at some length in this brief, even though the Commission's order was confined to class rates (except to the extent that the order incorporates, by reference, the report containing the classification findings and directions). However, apart from this incorporation by reference, there is another compelling reason why classification constitutes an essential part of this brief; namely, that classification is so inextricably interrelated to class rates that in the *Class Rate Investigation, 1939,* Docket No. 28300, it was found impossible, as a practical matter, to deal with class rates without also dealing with classifications. These two investigations were therefore ordered and conducted simultaneously and as one. Nor could classifications be dealt with separately (R. 71). As the Commission said in its report:

> Although the proceeding in No. 28310 brings in issue only the classifications, discussion of the differences as between them in ratings would be purely academic without indicating in some degree the effect they have upon the rates in the various territories. A rating must be complemented by a class rate, and vice versa, in order to give substance to either (R. 88).

From the foregoing discussion it might have been assumed that all freight traffic moves on class rates. Actually, there are three other kinds of rates on which far more freight traffic moves; and, because these other three kinds, although not directly involved in this case, are so related to class rates that they will be frequently discussed below, they require identification and definition (R. 177).

Exception rates result from the transfer of a commodity out of its regularly assigned class in the classification and into another class for one reason or another—because someone has felt this traffic should be treated differently (usually more favorably), and on an exception basis.

Commodity rates are special rates set up for particular commodities which take them entirely out of the classes to which they were originally assigned or any other class. Thus commodity rates bear no class number or letter symbols, and have no percentage relationships to first-class rates.

Column rates generally are like commodity rates in that they apply only to particular commodities and have no class number or letter symbols, but they are like class rates in that they are fixed as definite percentages of first-class rates.

The theory of rate making thus is that every commodity which may move by freight originally is described in the classification and assigned to one of the classes, but that, because of special situations, it is sometimes considered necessary to give special treatment to certain traffic, ranging from a small segment representing a short haul between particular points for one commodity of one manufacturer, to all the traffic in a group of commodities throughout an entire territory. When such a variation has been decided on, it may be set up and published in any one of these three ways, i. e., as an *exception rate*, a *commodity rate*, or a *column rate*.

In the early days of railroads, classification of freight was patterned after that used for boats and wagons, and did not follow any definite standards, each road having its own practice. Usually only a small variety of traffic moved on any one short railroad, so the needs for freight classification were rather simple. One railroad might designate its traffic as "light goods," "heavy goods," "case goods," "logs," and "whiskey"—a far cry from the modern freight classification containing over 20,000 ratings.

According to an estimate, there were at one time in Eastern Trunk-Line Territory,[4] alone 138 systems of freight classification, each made up for the rail line to which it applied.[5] The increased interchange of traffic between railroads called for systems of classification more comprehensive than those applying to a single railroad.[6] Often a number of different classifications were in effect on one railroad: one for local traffic; one for joint traffic (involving another railroad) in one direction, another for the opposite direction; and one or more applying to traffic moving to or from a particular section of the country. *Suspension of Western Classification,* 25 I. C. C. 442 (1912).

This multiplicity of classifications caused great confusion. It was difficult for the railroads accurately to quote rates on a shipment moving over a route composed of several railroads, and shippers often were forced to pay higher charges than anticipated because of the differences in classification between rail lines. The need for more nearly uniform freight classification was acute. With the passage of the Interstate Commerce Act of 1887, a stimulus was provided for uniformity in freight classification, because by the Act unjust discrimination was made unlawful.

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[4] Roughly, the Middle Atlantic States and West Virginia. See map opposite page 18.

[5] *Suspension of Western Classification*, 25 I. C. C. 442, 443 (1912).

[6] *Second Annual Report of the Interstate Commerce Commission*, 2 I. C. C. 268 (1889).

Establishment of the Official Classification was the most important early move in regional classification uniformity. Despite the large number of classifications in effect within the territory east of the Mississippi and north of the Ohio and Potomac Rivers, a committee appointed by the railroads in that area on February 18, 1887, "with a zeal and pertinacity unprecedented,"[7] finished its work on March 1, 1887, after only eleven days, of consolidating the numerous classifications into one classification, which became effective with the Act on April 1, 1887.[8]

A classification of limited application had been adopted in 1883 by a few of the Western railroads, and another classification by some of the Southern railroads in 1875,[9] but approximately 50 classifications were still in effect in the United States in 1886. The differences between these three major territorial classifications were then, and still are, fundamental and varied.[10]

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[7] *Fifth Annual Report of the Interstate Commerce Commission*, 3 I. C. C. 768 (1891).

[8] 2 I. C. C. 269.

[9] *Eleventh Annual Report of the Interstate Commerce Commission* (1897), p. 62.

Since Congress and the Interstate Commerce Commission were and are dealing with a national economy rather than a regional economy, it was naturally to be expected that under the direction of the Commission, national classification uniformity would quickly follow the enactment of the Interstate Commerce Act in 1887, especially after the experience of the Eastern carriers in 1887 in bringing about substantial classification uniformity in the East in a matter of a few days. The Commission in its First Annual Report to Congress (1887) commended the work of the railroads in reducing the great number of classifications then in effect, but emphasized the necessity of a single classification for the entire country. In many subsequent annual reports, the Commission made it clear that it expected the carriers to take the initiative, and that it considered national classification uniformity a feasible and essential step. Early unification efforts are described in some detail in *Western Classification* case, 25 I. C. C. 442, 459 (1912).

The expectations of the Commission proved themselves unjustified. It was more than 30

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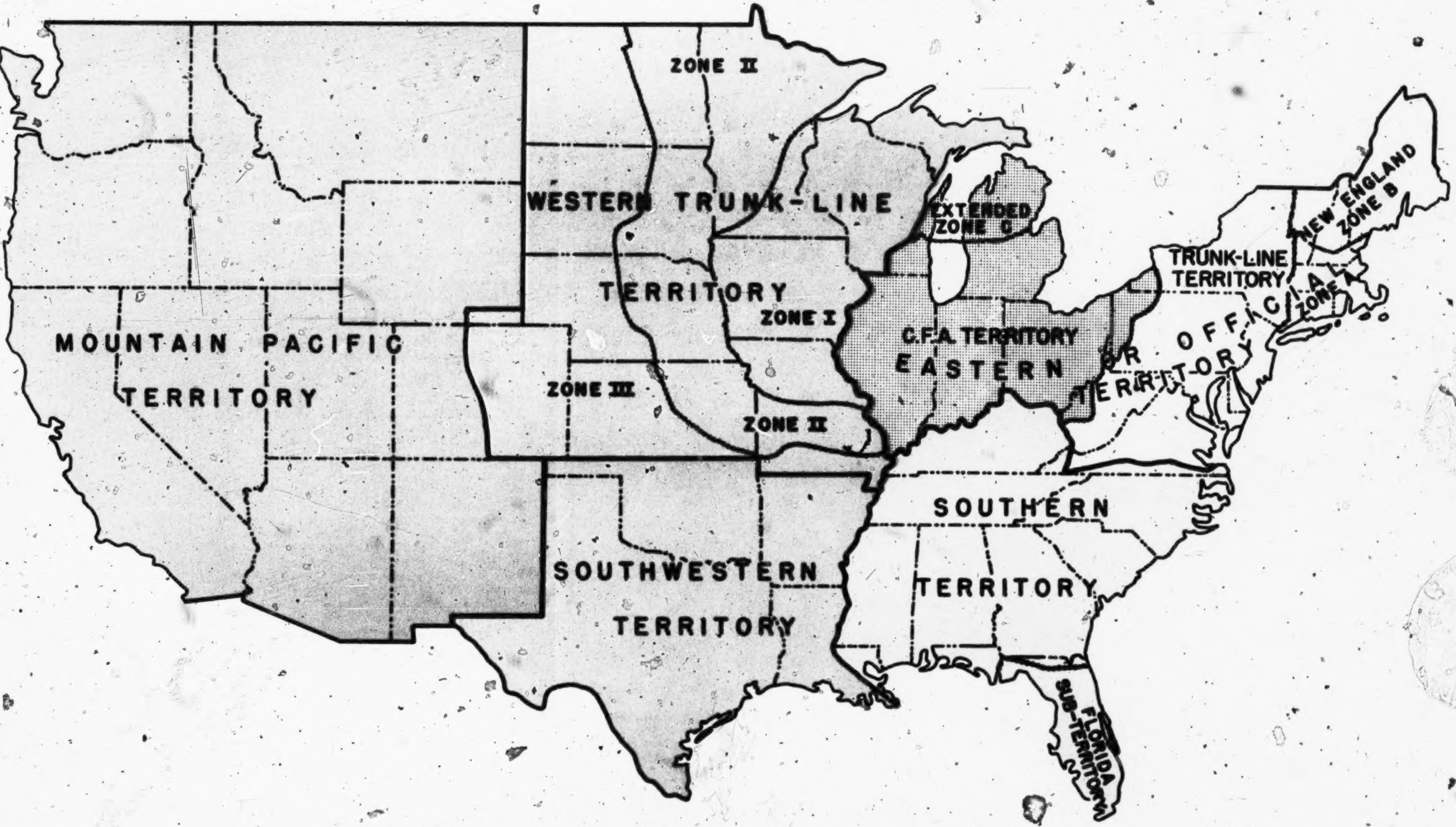
[10] The map opposite this page is a rate territory map rather than a classification map, but it also indicates the classification territories. Official and Southern rate territories are roughly coextensive with their classification territories. Western classification territory embraces the entire area west of the Mississippi River.


ZONE II
WESTERN TRUNK-LINE TERRITORY
ZONE I
ZONE III
ZONE II
MOUNTAIN PACIFIC TERRITORY
SOUTHWESTERN TERRITORY
EXTENDED ZONE C
C.F.A. TERRITORY
EASTERN OR OFFICIAL TERRITORY
TRUNK-LINE TERRITORY
NEW ENGLAND ZONE B
ZONE A
SOUTHERN TERRITORY
FLORIDA SUB-TERRITORY

MAP OF RAILROAD FREIGHT RATE TERRITORIES

ITRUST DIVISION
PRESENTATION SECTION

years after the Interstate Commerce Act was passed before any real progress was made in classification uniformity. In 1919, the Commission and the Director General of Railroads together succeeded in bringing about classification uniformity in rules, descriptions, packing specifications, and minimum carload weights, and in having the three major classifications (Official, Southern, and Western) physically published in one book, the Consolidated Freight Classification, instead of three. However, this uniformity, while important, did not touch the really fundamental question of uniformity in classification ratings, so it had no real effect on class rate uniformity, but was confined to eliminating some of the chaos which had existed at the periphery of the classification unification problem. *Consolidated Classification Case,* 54 I. C. C. 1 (1919).

Finally, in 1925, the Commission decided to wait no longer for the carriers to act. Appropriately enough, it was in an investigation of class rates (*Southern Class Rate Investigation,* 100 I. C. C. 513 (1925)) that the Commission for the first time prescribed uniform percentage relations between the ten classes then in existence in Southern Territory, and two additional classes created by the Commission. Similar action was taken for the Southwest in 1927 (*Consolidated Southwestern Cases,* 123 I. C. C. 203); for Western Trunk-Line Territory in 1931 (*Western Trunk Line Class Rates,* 164 I. C. C. 1); and in the same year for Official Territory (*Eastern Class Rate Investigation,* 164 I. C. C. 314).

In the *Consolidated Southwestern Cases, supra,* the Commission, at page 398, made this rather plaintive progress report:

> For years we have endeavored to promote uniformity in classifications. Except for unification of rules and commodity descriptions, the progress in that direction has not been encouraging. * * * So long as vital differences in classification exist it is impossible to bring about uniform class percentages throughout the country, but, on the other hand, until the class percentages are made more nearly uniform, progress toward uniform classification is impeded.

All the Commission had been able to do up to 1939 had been to attempt further to clean up, territory by territory, the classification uniformity problems *within* the separate territories. Nothing very important had been accomplished in 52 years in formulating national classification uniformity in connection with ratings. The only national uniformity achieved had been the non-rating progress in 1919 (which, after all, had no real bearing on the rate structures), and the substantial unification of ratings in Classes 1, 2, and 3 in 1936 (R. 117). Progress had been largely confined within the separate regions. This, however, did have the advantage of being a logical and necessary preliminary to national uniformity.

In 1939, there were three major classifications, just as there had been in 1887. The differences between these classifications, and their relationships to each other, are illustrated by the following table (which also includes the separate Illinois classification, a further complication):

Percentage relations of regular classes prescribed, and columns required to be published in class rate tariffs. (R. 88)

Rate column (percent of first class)	Official	Southern	Western Trunk-Line and Southwestern	Illinois	Rate column (percent of first class)	Official	Southern	Western Trunk-Line and Southwestern	Illinois
	Class	*Class*	*Class*	*Class*		*Class*	*Class*	*Class*	*Class*
100	1	1	1	1	32.5			B	B
92.5					30		8	C	
85	2	2	2	2	27.5	6			6, C
77.5					25		9		
70	3	3	3	3	22.5		10	D	D
65					20		11		E
60					17.5		12	E	
55	R26	4	4	R26	16				
50	4			4	15				
45		5	A		14.5				
42.5					13.5				
40		6		A	13				
38					12.5				
37.5			5	5	12				
35	5	7			8.5				

From this table it may be observed that articles are classified in Official, Illinois, Southern, and Western Classifications, respectively, into 7, 12 (or 11, since classes 6 and C are the same percentage of first class), 12, and 10 *regular* numbered or lettered classes. In addition, there are 7 regular classes not shown in the table; namely, 1¼, 1½, 1¾, 2, 2½, 3, and 4 times the class 100 or first-class rates. Besides the regular classes described above, there are in Official, Southern, and

Western Classifications, respectively, 16, 14, and 12 additional classes that are stated in percentages of class 100, of which 3, 5, and 3 classes, respectively, are the same percentage of class 100 rates as are certain regular classes in these classifications (R. 82).

The total of all classes, namely, those above class 100, regular (numbered and lettered), and percentage, in Official, Southern, and Western Classifications, are 27, 28, and 26, respectively, counting equivalent regular and percentage classes as one.

In the Consolidated Freight Classification (analyzed in Ex. 167, R. 10469, 3780) as of August 3, 1942, 20,916 sets of ratings then in effect were listed (R. 83). Some, slightly over one-third of the carload ratings, were uniform in the three classifications, but the balance of all carload ratings represented differences between the three territories, and almost one-fourth of the total carload ratings were unlike in any two of the classifications.

The ratings are subject to numerous substantial variations, inconsistencies, and disparities, especially carload ratings. The great bulk of the article items are concentrated in comparatively few classes, and some classes contain no items at all, or only 1, 2, or 3 items. For example, as to less-carload ratings, on items rated class 50 in Official, the ratings in Southern range from classes 30 to 70, and in Western from classes 55 to 85; on items rated class 70 in Southern the ratings range from classes 50 to 100 in Official, and from classes 55 to 85 in Western; and on items rated class 55 in Western the ratings range from classes 40 to 100 in Official, and from classes 30 to 100 in Southern.[11]

Still greater variations, relatively, are presented in the carload ratings,[12] of which the following are examples: On items rated class 35 in Official, the ratings in Southern and Western both range from classes 17½ to 55; on items rated class 40 in Southern, the ratings in Official range from classes 27½ to 70, and in Western, from classes 17½ to 40; and on items rated class 45 in Western, the ratings in Official range from classes 27½ to 85, and in Southern, from classes 30 to 55. Out of 10,648 carload ratings, 4157 in Southern and 5107 in Western are higher than in Official, and 1376 and 1019, respectively, are lower.

There is no consistency in the assignment of ratings on the same article as between less-carloads and carloads. On a given item, one classification will provide the same rating for less-carloads as for carloads, but in the other classifications, the ratings for carloads will be lower (or perhaps higher) than for less-carloads. A uniform carload rating and minimum weight will be stated in all three classifications for a number of other items, indicating similar transportation characteristics, but the variations in their less-carload ratings, are for example, from class 55 to class 100, and from class 70 to class 250. Although the less-carload and carload ratings are the same on many items, on the great majority of them the former are higher than the latter, and often extremely wide spreads occur, counting regular ratings. For example, in Southern and Western Classifications, the spreads are from class 17½ to class 100, meaning that the less-carload ratings are up to 471 percent higher than carload ratings.

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[11] See table on p. 92 94, *infra*.

[12] See tables on pp. ~~[illegible]~~ 93, 95, *infra*.

These differences, of course, show up even more in the rates themselves than they do in the ratings. Even where the ratings are the same, the rate effect differs substantially, because of the variances in territorial rate levels. Thus, the 616 articles rated class 55 in less-carloads in the Official Classification, which move at a rate of 44 cents for 200 miles in Official Territory, are rated from classes 40 to 85 in Southern Classification on which the rates for 200 miles are from 45 to 95 cents in Southern Territory. The same articles are rated from classes 55 to 85 in Western Classification, on which the rates for 200 miles in Western Trunk-Line Zone I[13] range from 53 to 82 cents.

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[13] The rate territories, as distinguished from the classification territories, are shown on the map opposite p. 18, which also shows rate territory zones and other subdivisions. The latter are explained in the next section of this brief.

To illustrate the glaring failure of the carriers to act toward simplification, it might be noted that they have not even simplified the classifications to the extent this would be possible without actually changing the relations or the substance of the ratings, where the only difference between the three major classifications on a particular article is in nomenclature. For example, Rule 26 in Official Classification is 55 percent of first class, and fourth class in Southern and Western Classifications is also 55 percent. In the three classifications there are also a number of other ratings which are simply 55 percent of first class. If the same term were used in the three classifications for all such ratings, there would be both apparent and actual uniformity of 565 less-carload and 1708 carload ratings, where at present there are apparent but not actual differences.

The real problem caused by different territorial classifications comes, of course, in the making of interterritorial rates.[14] With the differences already noted between these classifications, and between the rate levels, as well, of the several territories, it is readily apparent what a complicated situation exists in interterritorial rate making. Not only are the rate levels different and the articles assigned to different classes; the classes frequently have different identification symbols, or the same identification symbol represents classes having different percentage relationship to first class or to other classes. Sometimes a direct route goes through all three classification territories. Sometimes a classification has been prescribed on the destination territory principle. Thus, different rates exist in opposite directions between the same points, and over the same routes, on classes that do not bear like percentage relations to the corresponding first-class rates between the territories concerned (R. 73–74).

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[14] Generally speaking, the Official Classification applies within Official Territory and from Western Trunk-Line Territory to Official. The Southern Classification applies within Southern Territory, between Official and Southern, and from Western Trunk-Line to Southern. The Western Classification applies within Western Territory, between Southwestern and Official, between Southwestern and Southern, from Official to Western Trunk-Line, between Mountain Pacific and Official, from Southern to Western Trunk-Line, and between Mountain-Pacific and Southern (R. 73).

A concrete example[15] will illustrate this situation. In 1939, the Commission ruled that stoves should move from Southern to Official Territory on the Official level of rates. Stoves in carloads within Official Territory generally move on 35 percent of first-class, which, for a 400-mile haul, would mean a rate of 38 cents per 100 pounds. However, the interterritorial level of rates between Southern and Official territories is considerably higher than within Official; namely, 135 percent of the Official rate, or 51 cents for the

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[15] *State of Alabama* v. *New York Central R. Co.*, 235 I. C. C. 255 (1939); 237 I. C. C. 515 (1940).

400-mile haul. Therefore, the Commission tried to bring the northbound interterritorial rates down to the Official level by giving stoves the classification rating of 25.5 percent of first class for the haul.

This method could not bring about uniformity, because shippers with only a small portion of the interterritorial haul in Southern Territory and a large part of it in Official, obtained a rate lower than the Official level, while in the opposite situation shippers with a small portion of the interterritorial haul in Official Territory and a large part in Southern, obtained a rate higher than the Official level. Uniformity is an impossibility when the only method available is to adjust the classification ratings on interterritorial rates, where the classifications and rate levels differ between the territories involved. Therefore, the Commission finally prescribed both the Official Classification and the Official rate scale for the north-bound movement of stoves from Southern to Official Territory. Obviously, if the Commission, after more than 50 years' experience in rate making, is obliged to go through a complicated and cumbersome procedure like this for each of the tens of thousands of rate problems which may be presented, the time is ripe for some simplification of the system.

Two more factors deserve consideration. First is the apparent impossibility of ever achieving classification uniformity without having classification ratings assigned on a national basis. The factors which should enter into decisions about which class to put a particular item in are the subject of general agreement,[16] but the question of which factor, or factors, should be given greater weight than others, is a matter for individual judgment. An elaborate study which was introduced in evidence (Exs. 38–45, R. 6745–6818, 1929), makes it plain that no classification formula which would be administered by different territorial classification committees could ever hope to achieve uniformity.

The remaining point is the readily demonstrable fact that the carriers have shown such an aversion to the classification ratings, after their intraterritorial unification, that the class rates have become largely obsolete for practical purposes. In the *Eastern Class Rate Investigation, supra,* the Commission set up the class rate tariffs for Official Territory in terms of 23 percentage relationships to first-class rates, in addition to the 7 regular classes, with the objective of providing not only intraterritorial uniformity but also a "proper degree of flexibility" (164 I. C. C. 372). However, the railroads have carried these percentages into the several classifications only to a slight extent for the purpose of providing classification ratings additional to those of the regular classes (R. 349–50). Flexibility, when considered necessary, has all but invariably been accomplished by making an exception to the classification, thus removing the commodity from the classification for rate-making purposes, rather than giving it a rating of a percentage of first-class (R. 88). Most of the percentage relations have not been used in the Official Classification at all, and where these percentages have been used for rate making, resort has been had to the device of removing the commodity *pro tanto* from the classification and assigning it a rate in a special tariff (R. 2229–30).

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[16] Weight, value, damage risk, degree of care necessary, packing, competitive relationship to other articles, commercial conditions, and units of sales, volumes, etc. (Ex. 69, R. 7739–44, 2234, 2283).

(a) Commission's classification findings

The conclusions and findings of the Commission on classification of freight (R. 116–27) may be summarized as follows: The existing classifications are unlawful and will continue unlawful until national uniformity of classification is achieved; the present limited classification uniformity is more theoretical than real and has been made more so by the constantly increasing exception ratings, which have made the classifications outmoded; the same classification principles apply everywhere, and where differences in geographic conditions produce widely divergent costs, revenue needs, or other factors requiring specific rate adjustments, these adjustments should be made in the rate levels, or by legitimate exceptions to the classification, rather than in the basic classification itself; the rigid territorial boundaries separating classification territories are artificial rather than real, and cause serious complications in border areas, especially in connection with joint, through, interterritorial rates which have been becoming increasingly important since 1928;[17] if the same classification rating can apply in a single area which includes regions so dissimilar as Maine and Southern Illinois, both of which are in Official Territory, or Florida and Kentucky, both of which are in Southern Territory, as at present, a single classification could apply with equal appropriateness throughout the United States; abundant evidence had been offered that shippers in one territory pay more than shippers in another territory on the same article, to a large extent because of classification differences, and this evidence was sufficient to support the decision that national classification uniformity is essential, without the necessity of examining every one of the more than 20,000 separate ratings; there is no real uniformity of classification ratings below

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[17] Before 1928, interterritorial class rates involving more than one carrier were largely combination rates, i. e., made by adding up the rates charged by each carrier. With the intraterritorial class rate revisions, these through rates became largely joint rather than combination rates, i. e., they were built on the rate base of one or more of the territories (R. 1943-4).

Class 3, and without such uniformity it is impossible to maintain a just and reasonable relationship between class rates as between competing commodities; it is entirely feasible for the railroads to establish a uniform classification; and exceptions to the classification will be permitted when necessary, when they will not tend to impair general classification uniformity.

The Commission gave the railroads the opportunity to take the initiative in preparing the new, uniform classification, and they have stated that they will do so (R. 841). This commitment does not, of course, make classifications less important in this proceeding, because the Commission found that the class rate revision was dependent on classification revision, and *vice versa*. See p. 13, *supra*.

The opposition before the Commission to a uniform classification seemed to center on the unfeasibility of the undertaking. The Commission had before it the results of a previous investigation indicating that the classification differences within Official Territory prior to 1887 were at least as difficult and complicated, as between the three subdivisions of Official Territory at that time, as are the differences between the present three territories, Official, Southern, and Western. *Fifth Annual Report of the Interstate Commerce Commission*, 3 I. C. C. 768 (1891). If those differences in Official Territory could be satisfactorily resolved within 11 days in 1887, surely the resolving of the differences between the three major territories today, with the added experience of over fifty years, is not an undertaking beyond the bounds of possibility. In any event, the Commission found feasibility as a fact. (R. 125.)

(3) *Class rate structures*

As explained above, neither the classification alone, nor the class rate alone, makes the cost of the shipment. Also, as already noted, classification uniformity *within* territories has proceeded largely hand in hand with class rate structure uniformity *within* territories. However, whereas there are only three classifications and classification territories,[18] with no further subdivisions, there are five major rate territories. Two of the major classification territories, Official and Southern, have boundaries practically co-extensive with the rate territories bearing the same names. The third, Western Classification Territory, consists of the area west of the Mississippi River, in which three rate territories are located: Western Trunk-Line, Southwestern, and Mountain Pacific. The rate territories are indicated on the map opposite page 18.

The railroad freight rate structure of the United States has developed on a localized basis like a patchwork quilt, with each locality or railroad starting with a different level and scheme of rates. Particularly is this true of class rates. The localities and railroads have grown and merged into fewer levels and schemes, until they finally reached the territorial boundaries, but the crossing of these boundaries to achieve national uniformity had to await these proceedings.

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[18] Except Illinois, which requires no further separate treatment.

The present class rate structure in each of the rate territories here involved is the result of a separate comprehensive investigation conducted by the Commission for each territory. These investigations brought a degree of order to the class rate structure on a regional basis, but no attempt was made to harmonize or relate the regional rate adjustments one to another. A brief description of the intraterritorial class rate adjustments or structures (rates applying *within* each territory) will first be given, and then the interterritorial class rate adjustments or structures (rates applying *between* rate territories).

(a) Intraterritorial class rates

(i) *Within Official Territory.*—This territory lies roughly east of the Mississippi River and north of the Ohio and Potomac Rivers, including most of Virginia. The class rates originally prescribed for it by the Commission became effective in 1931.[10] Prior to that investigation, Official Territory had three rate structure subdivisions: New England, Trunk-Line, and Central Freight Association territories.

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[10] *Eastern Class Rate Investigation*, 164 I. C. C. 314 (1930), with supplemental decisions at 171 I. C. C. 481; 177 I. C. C. 156; and 203 I. C. C. 357.

New England comprised the six New England States. Trunk-Line Territory lay west of New England and the Atlantic Coast and extended as far west as the so-called Buffalo-Pittsburgh line.[20] Central Freight Association Territory, also known as C. F. A. or Central Territory, lay west of Trunk-Line Territory. Each had a different rate structure, concerning which the Commission has stated: "The rate structures in effect within and between the three subdivisions of Official Territory have grown up independently of each other and for the most part with little common resemblance."[21] That "the class rates between New England and Trunk-Line Territory are difficult to describe because they are not based upon any definite principle"[22] shows with what a heterogeneous array of rates the Commission was obliged to deal in the *Eastern Class Rate Investigation.*

As a result of the investigation, a single new class rate structure was prescribed for the whole

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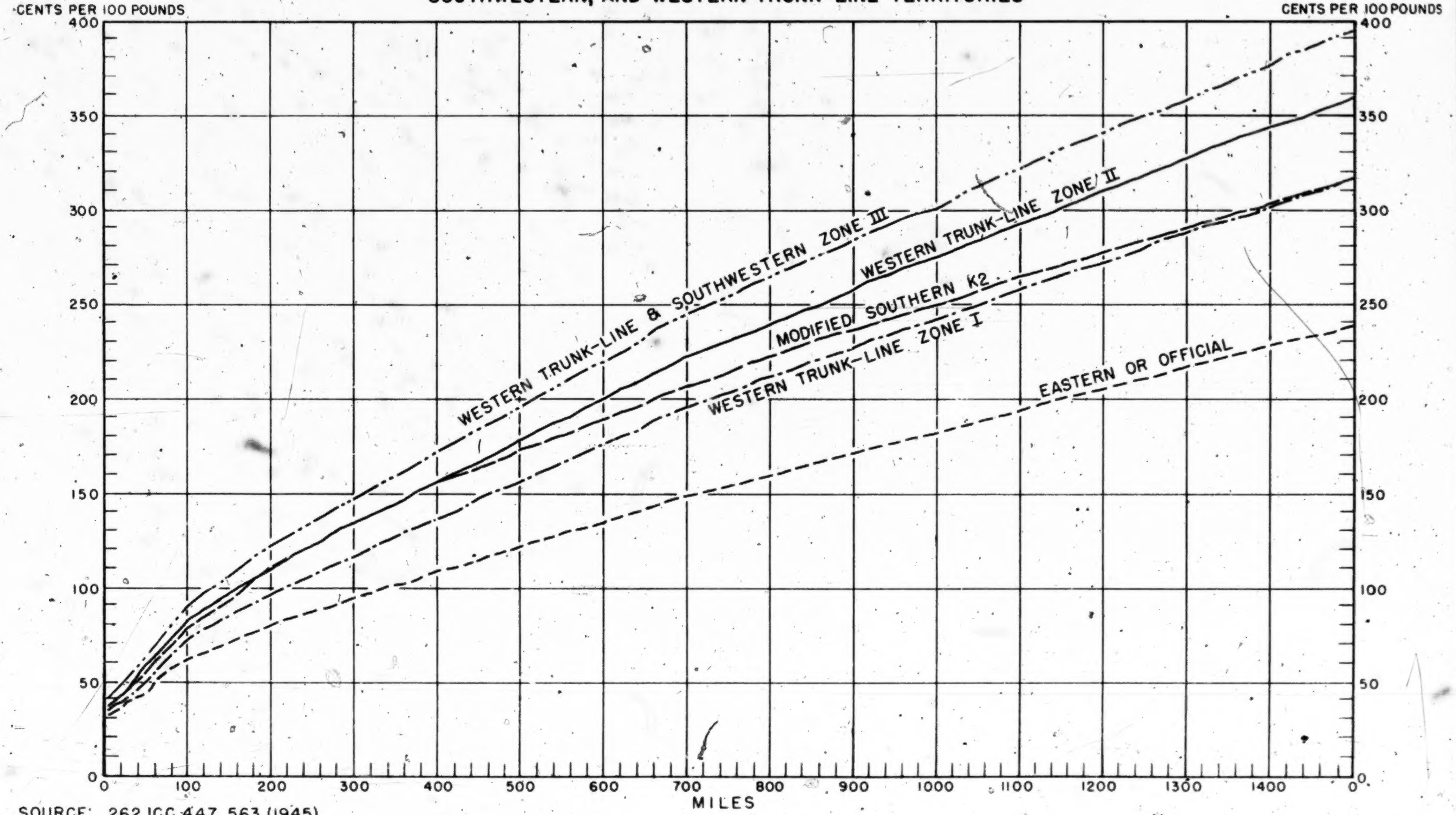
[20] Running through Buffalo and Salamanca, New York; Warren, Oil City, Pittsburgh, and Washington, Pennsylvania; Wheeling, Parkersburg, Charleston, and Gauley, West Virginia.

[21] 164 I. C. C. 323. For a discussion of the rate history of Official Territory when it was composed of three subdivisions see 164 I. C. C. 323–35.

[22] 164 I. C. C. 332.

INTRATERRITORIAL FIRST CLASS RATE SCALES IN OFFICIAL, SOUTHERN, SOUTHWESTERN, AND WESTERN TRUNK-LINE TERRITORIES



SOURCE: 262 ICC 447, 563 (1945)

of Official Territory, with somewhat higher rates for New England and a part of Central Territory designated as Zone C. The basic scale of first-class rates (known as a mileage or distance scale of rates) declared to be maximum reasonable rates started with a rate of 30 cents per 100 pounds for distances of 5 miles or less. In the first 100 miles the rate increased from the initial 30 cents to 56 cents. From 100 to 200 miles the increase was 17 cents; from 200 to 300 miles, 14 cents; from 300 to 700 miles, 12 cents for each 100 miles; and thereafter 10 cents for each 100 miles, to 1,500 miles. Comparative levels and progressions of the first class rates *within* each of the major rate territories are shown in the chart on the opposite page. In figuring distances, the shortest routes over which carload traffic can be moved without transfer of lading from one car to another were to be used.

The Commission prescribed a definite relation of the rates on lower classes to first class. These 23 columns bearing a percentage relation to first class rates were required: *100,* 92.5, *85,* 77.5, *70,* 65, 60, *55, 50,* 45, 40, 37.5, *35,* 32.5, 30, *27.5,* 25, 22.5, 20, 17.5, 16, 14.5, and 13. The percentages in italics represent those for the seven regular classes now observed in Official Classification, and correspond to classes 1, 2, 3, R26, 4, 5, and 6, respectively.

In New England, on the ground of varying transportation conditions, higher rates than the basic scale were prescribed. Two areas or zones were set up: Zone A, comprising southern New England, and Zone B, comprising Northern New England.[23] The scale for Zone A was 5 percent higher than the Official scale; that for Zone B was about 15 percent higher. On traffic moving between these zones the Zone A scale applies, with the addition of other so-called arbitraries for the distance traversed in Zone B. These latter arbitraries, averaging about 8.8 percent of the Official scale, were used in making rates between Zone B and Trunk-Line Territory. Between Zone B and other parts of Official Territory no arbitratries were added, nor were any arbitraries added for *any* other movements to or from Zone A.

Zone C originally comprised most of the northern part of the southern peninsula of Michigan. For distances in Zone C, arbitraries equal to 10 percent of the basic Official scale were added to the rate for the entire distance under the basic scale. Zone C was extended to include a strip of Wisconsin along Lake Michigan;[24] consequently, the territory is often referred to as "Extended Zone C".

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[23] New England zones roughly are divided by a line drawn through Windsor, Vt., Concord, N. H., and Portland, Me., the portion south of the line being designated Zone "A" and north of the line Zone "B".

[24] *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 211 (1930).

In addition to the special treatment afforded New England and Zone C, arbitraries were prescribed for thin-traffic branches of standard lines and for a number of weak and short-line railroads.

Although the class rate system prescribed for Official Territory was on a distance, or mileage, basis, a certain amount of grouping of points was found desirable, to which "key-point rates" were applied. Key-point rates apply between the larger centers of population and industry, with which are grouped less important contiguous points in order to make logical groups. These key rates are less than rates that would result from application of the basic distance scale.

(ii) *Within Southern Territory.*—Southern Territory lies south of Official Territory and east of the Mississippi River. The class rates within Southern Territory became effective in 1928.[25]

The class rate structure in Southern Territory, before this adjustment, was a hodge-podge of rates built around the old basing point system, under which small points having no competitive advantage paid rates consisting of the through rate to the basing point plus the local rate from the basing point to the small town having no competitive advantage of water service or railroad competition. Progress had been made in correct-ing abuses, but the Commission said of the Southern Territory rate structure prior to revision, "great inconsistencies prevail." [26]

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[25] *Southern Class Rate Investigation*, 100 I. C. C. 513 (1925), with supplemental decisions at 109 I. C. C. 300; 113 I. C. C. 200; and 128 I. C. C. 567.

A distance scale of first-class rates, designated as maximum reasonable rates, was prescribed for use, with certain exceptions, throughout the territory. In figuring distances for applying the scale, the Commission required use of the shortest rail routes over which carload traffic can be moved without transfer of lading.

The class rate scale finally settled upon is known in transportation parlance as the "K-2" scale. It began with a rate of 34 cents for 5 miles or less. The rate of progression was 42 cents in the first 100 miles; 26 cents from 100 to 200 miles; 20 cents for each 100 miles from 200 to 400 miles; 15 cents for each 100 miles from 400 to 800 miles; and 12 cents for each 100 miles thereafter to 1,500 miles. Later, following a Commission decision on class rates in North Carolina,[27] the Southern railroads voluntarily changed the class rates throughout Southern Territory to conform with those established in North Carolina, resulting in lower rates on distances up to 190 miles.

The Commission required that there be twelve classes, including first class, bearing the following percentage relationships to first class: 100, 85, 70, 55, 45, 40, 35, 30, 25, 22.5, 20, and 17.5. These classes appear in the Southern Classification, and are designated as Class 1 through Class 12, respectively.

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[26] 100 I. C. C. at 532. For a rate history of Southern Territory prior to the *Southern Class Rate Investigation* see 100 I. C. C. 520, *et seq.*

[27] *Class Rates within the State of North Carolina*, 238 I. C. C. 225 (1940); 248 I. C. C. 479 (1942).

Three departures were made from the single basic scale of class rates prescribed for Southern Territory. First, special treatment was given Florida on the theory that the peninsula had little "overhead"' traffic, which is traffic moving through the area that does not originate or terminate there. To allow additional revenue to the railroads operating in Florida, the Commission set up a scale of arbitraries, equal to about 15 per cent, to be added to the basic rate scale. Unlike the New England arbitraries (p. 36, *supra*), the Florida arbitraries applied to *all* movements.

The second departure from use of the basic scale within Southern Territory was between points in Virginia and North Carolina not covered in the general investigation. Subsequently a scale of rates was prescribed for use between points in Virginia in Southern Territory (Virginia points south of the Virginian Railway) and points in North Carolina.[38] The scale, known as the Virginia-Carolina scale, started with the same rate as the basic scale, but from 15 to 200 miles the rates were less than the basic scale. The scales became identical at 200 miles and remained so up to 400 miles, after which the Virginia-North Carolina scale was higher up to 600 miles, where it ends.

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[38] *North Carolina Corporation Commission* v. *Akron, Canton & Youngstown Ry. Co.*, 213 I. C. C. 259 (1935).

The third departure allowed from the application of the single basic class rate scale in the South was for the benefit of weak and short-line railroads. Aside from the Norfolk & Southern Railroad, which was allowed the use of the Florida arbitraries for distances on its own line, these railroads were allowed to adopt such arbitraries as were deemed necessary and then to apply to the Commission for approval. Relief was granted to many weak and short lines, virtually giving approval to the various scales of arbitraries proposed by these railroads.[29]

The Commission pointed out to all the Southern railroads that flexibility in application of the basic scale was desirable, and suggested that the railroads might make sparing use of groups of points as though they were single origins or destinations. The Southern Territory carriers have followed this suggestion, with a tendency toward larger and larger groups.

(iii) *Within Western Trunk-Line Territory*—This rate territory is located approximately between Official Territory and the Rocky Mountains.

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[29] *Rates from, to, and between points in Southern Territory,* 191 I. C. C. 507 (1933).

The prevailing class rates within Western Trunk-Line Territory were originally formulated by the Commission in 1930[30] and became effective in 1931.

The early history of class rates in the territory discloses numerous and varying rate bases evolved piecemeal by the railroads since the early days of railroad expansion in the West. The rate structure has been the subject of complaints by every state regulatory commission in the territory.[31]

For Western Trunk-Line the Commission established three subdivisions, or zones, and later a fourth, irrelevant for present purposes. A scale of first-class rates designated by the Commission to be reasonable maximum rates was set up for each zone. With the Zone I scale taken as 100 per cent, Zone II was about 112 percent, and Zone III 120 percent. Zoning was utilized to build up to the extremely high level of class rates prescribed for Southwestern Territory adjoining Western Trunk-Line on the South.

Generally, the decision on Western Trunk-Line class rates raised rates in the eastern part of that territory and lowered them in the western part, bringing the levels slightly closer together. The Zone I first-class rates began at 32 cents for 5 miles or less, while Zone II began at 34 cents, Zone III at 36 cents, and Zone IV at 38 cents.[32]

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[30] *Western Trunk-Line Class Rates*, 164 I. C. C. 1 (1930). Supplemental decisions include 173 I. C. C. 637 (1931); 178 I. C. C. 619 (1931); 181 I. C. C. 301 (1931); 196 I. C. C. 494 (1933); 127 I. C. C. 57 (1933); 204 I. C. C. 595 (1934); 210 I. C. C. 312 (1935); 246 I. C. C. 119 (1941).

[31] For a brief history of these class rates see 164 I. C. C. 26–36.

As in other class-rate adjustments, distances were computed over the shortest rail routes over which carload traffic could be transported without unloading and reloading the freight.

There were 23 classes established with percentage relationships to first class as follows: *100*, 92.5, *85*, 77.5, *70*, 65, 60, *55*, 50, *45*, 40, *37.5*, 35, *32.5*, *30*, 27.5, 25, *22.5*, 20, *17.5*, 16, 14.5, and 13. The percentages in italics are the regular classes in the Western Classification, classes 1, 2, 3, 4, A, 5, B, C, D, and E, respectively.

A method of constructing rates for traffic movement through these zones, each with a different scale of rates, was, of course, necessary. This was done by taking the rate for the entire distance at the scale applying in the lowest-rated zone through which the rate-making distance was computed, plus the "zone differential"[33] for the next higher zone for the distance in that and higher zones, and so on for the full distance. To illustrate: If the distance between two cities in Western Trunk-Line is 600 miles, of which 150 miles is in Zone I, 350 miles in Zone II, and 100 miles in Zone III, the rate would consist of the Zone I rate for 600 miles, plus the Zone II differential for 450 miles, plus the Zone III differential for 100 miles. This method of building up a rate scale layer upon layer produces what is commonly called "a laminated scale". Obviously such a method builds up the class rates to higher and higher levels.

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[32] *Western Trunk-Line Class Rates*, Sixth Supplemental Report, 204 I. C. C. 595 (1934).

[33] The zone differentials were prescribed by the Commission and represent the amount by which a rate in one zone exceeds the rate for the same distance in the zone next lower.

In Western Trunk-Line Territory, weak and short-line railroads were allowed to add arbitraries to give them additional revenue, as in other territories. A certain amount of grouping of origin and destination points was permitted, with the groups limited to a maximum diameter of 25 miles.

(iv) *Within Southwestern Territory.*—Southwestern Territory lies south of Western Trunk-Line Territory and west of the Mississippi River, and includes Arkansas, Texas, Oklahoma, and part of Louisiana. The structure of class rates in Southwestern Territory resulted from a decision of the Commission in 1927,[34] effective in 1928, plus over thirty supplemental reports, the twenty-first [35] of which revised the rates originally prescribed, and harmonized them with Zones III and IV of Western Trunk-Line. This became effective in 1937. Southwestern Territory thus was divided into Zones III and IV.

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[34] *Consolidated Southwestern Cases*, 123 I. C. C. 203 (1927). The history of this rate structure begins at 123 I. C. C. 217.

[35] 205 I. C. C. 601 (1934).

It is unnecessary to explain the relationship between these two zones in Southwestern Territory, because effective in 1941 Zone IV was eliminated by the railroads with Commission consent (R. 2554), leaving the basic rate scale for the entire Southwest the same as Zone III in Western Trunk-Line Territory. Short-line distances were observed in the application of the rate scales, and weak and short lines were allowed the use of arbitraries.

The Commission, in the twenty-first supplemental report in the *Consolidated Southwestern Cases,* required the setting up of 26 columns of rates having the following percentage relationships to first class: *100, 85, 70,* 65, 60, *55,* 50, *45,* 42.5, 40, 38, *37.5,* 35, *32.5, 30,* 27.5, 25, *22.5,* 20, *17.5,* 16, 15, 13.5, 12.5, 12, 8.5. The percentages in italics are the ten regular classes provided in Western Classification, effective west of the Mississippi River.

(v) *Mountain-Pacific Territory.*—This territory is not included in the scope of the class rate investigation involved in this proceeding, so no description of its class rates is necessary here. The Commission has never made a comprehensive investigation of the class rates in Mountain-Pacific Territory, where rates still are made on a hodge-podge basis, comparable to the way rates were made in the other territories before their rates were established on regional bases as the result of the four major Commission class rate investigations described above.

(b) Interterritorial class rates

The preceding sections have dealt with class rates applying *within* the various rate territories, called intraterritorial class rates. Each territory has its own level and plan of these rates; consequently, the rate structures do not fit together at the boundaries and are unsuitable for moving traffic between territories.

A separate interterritorial rate structure applies between Official and Southern territories, another applies between Western Trunk-Line and Official, still another between Southern and Southwestern territories, and so on. These structures are extremely complex, and reflect the patchwork of numerous attempts to adapt the present class rate structures to what they are totally unsuited for—a national flow of traffic in the United States.

The object here is to describe in general terms representative interterritorial freight rate schemes and adjustments; no attempt will here be made to describe every interterritorial rate situation.

(i) *Between Southern and Official Territories*[39]

For the purpose of making class rates between these territories, Official Territory is divided roughly into two parts, divided generally by the Buffalo-Pittsburgh line (see p. 34, *supra*). The rates between the eastern portion of Official Territory and Southern Territory are on a different basis from those between the western part and the South.

Between Southern Territory and the area west of the Buffalo-Pittsburgh line, known as Central or C. F. A. (Central Freight Association) Territory, class rates are constructed according to a system established by the Commission in the *Southern Class Rate Investigation,* *supra.* These interterritorial rates are made by the joint use of two rate scales, the Southern K–2 scale (p. 38, *supra*), and the Q–1 scales of differentials, which are combined into the interterritorial K–2—Q–1 scheme.

To compute interterritorial rates under this scheme, the basic Southern Territory scale, K–2, is used for the distance within that territory to or from the point at which traffic passes from one territory to the other (known as a "gateway"). To this rate is added an additional amount, or differential, for the distance in Central Territory according to one of the Q–1 distance scales.

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[39] From *Southern Class Rate Investigation,* 100 I. C. C. 513 (1925); 109 I. C. C. 300 (1926); 113 I. C. C. 200 (1926); 128 I. C. C. 567 (1927). The early history of these rates is given at 100 I. C. C. 550–566.

The Q–1 scales of differentials are four in number, and the scale used depends on the distance of the point of origin or destination in Southern Territory from the gateways. The highest differentials are applied if the origins or destinations in Southern Territory are 30 miles or less from the gateways. The next lower scale of differentials applies if the Southern origins or destinations are more than 30 miles from the gateways, but not more than 100 miles. The next lower scale of differentials applies on traffic to or from points more than 100 miles, but not more than 340 miles, from the gateways. The lowest scale of differentials applies if the Southern origins or destinations are more than 340 miles from the gateways. Thus for a distance of 200 miles in Central Territory, a first-class differential of 38 cents would be added if the Southern origin or destination were 30 miles or less from the gateway, 35 cents if it were over 30 and not over 100 miles from the gateway, 32 cents if more than 100 miles but not over 340 miles, and 28 cents if over 340 miles from the gateway.

The K–2—Q–1 interterritorial class rates are lower than the intraterritorial rates within the South for the same distances. This means that the shipper in Official Territory can ship to the South on a lower rate, mile for mile, than is available to the Southern Territory shipper for shipping within the South. Likewise, the Southern industry shipping to Official Territory is at a disadvantage when compared with the Official shipper moving his goods an equal distance within Official Territory, because the interterritorial scale is higher, distance considered, than the Official level of class rates (R. 2555–6).

The foregoing gives a general picture of the interterritorial rates between the western portion of Official Territory and the South. Left for consideration is that part of Official Territory east of the Buffalo-Pittsburgh line, made up of Trunk-Line and New England territories. The presence of joint rail and water service between this area and the South has depressed the rail rates, so the Commission has prescribed key-point rates between important points in New England and Trunk-Line territories, and groups of points in the South, lower than would result from applying the K–2—Q–1 formula (Ex. 88; R. 8137, 8144, 2578).

Between points in Kentucky, southern Virginia, North Carolina, and eastern Tennessee, known as "border territory", and Official Territory, there is a special adjustment of rates.[37] This gives a somewhat different basis from the K-2—Q-1 scheme. The general effect of this arrangement is lower rates between the border area and Official Territory—one of the piecemeal attempts to reduce the sharp differences in rates which otherwise would exist for contiguous points on different sides of the territorial boundary.

The all-rail and rail-water rates between New England and Trunk-Line Territories, and the South, were prescribed between the key points in New England and Trunk-Line Territory, and the rate groups in the eastern part of Southern Territory. There is no fixed differential relationship between the rail-water rates and the all-rail rates. Where the water distance is a large part of the through water-rail distance, the differential under the all-rail rate is considerable. As the rail portion of the haul increases, as it does to and from interior points, the spread decreases until it finally disappears.

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[37] *North Carolina Corporation Commission* v. *Akron, Canton & Youngstown Ry. Co.*, 213 I. C. C. 259 (1935); *Commonwealth of Kentucky* v. *Ahnapee and Western Ry. Co.*, 213 I. C. C. 297 (1935); *East Tennessee Border Traffic Association* v. *Akron, Canton & Youngstown Ry. Co.*, 214 I. C. C. 316 (1936); and supplemental decisions in the combined dockets 218 I. C. C. 521 (1936), 229 I. C. C. 20 (1938), 231 I. C. C. 453 (1939).

(ii). *Between Western Trunk-Line and Official Territories*[38]

Between some of the western part of Official Territory, and Western Trunk-Line Territory, class rates are made on a mileage scale. The western part of Official Territory involved is made up of Illinois, the part of Wisconsin in Official Territory, Indiana, and Michigan except points in the southeast corner.

Class rates between this area (excluding Zone C)[39] and Western Trunk-Line are determined by applying a mileage scale, called the "basic scale," for the entire distance from origin to destination, and adding zone differentials for the distances in the various Western Trunk-Line zones, the laminated scale method described in connection with Western Trunk-Line zone class rates.[40]

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[38] For a history of these rates see *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 36–42 (1930). The interterritorial class rates between these two territories have been brought about by this decision and its supplements at 173 I. C. C. 637 (1931), 178 I. C. C. 619 (1931), 181 I. C. C. 301 (1931), 196 I. C. C. 494 (1933), 197 I. C. C. 57 (1933), 204 I. C. C. 595 (1934), 210 I. C. C. 312 (1935), and 246 I. C. C. 119 (1941); *Public Service Commission of Wyoming* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 196 I. C. C. 413 (1933); *W. H. Bintz Co.* v. *Abilene & Southern Ry. Co.*, 216 I. C. C. 481 (1936), 218 I. C. C. 793 (1936); and *Great Falls Traffic Association* v. *Chicago, Burlington & Quincy R. Co.*, 226 I. C. C. 467 (1938), 235 I. C. C. 459 (1939).

[39] Between Zone C in Michigan and Wisconsin, and Western Trunk-Line, class rates are constructed as described here plus Zone C differentials as prescribed in the *Eastern Class Rate Investigation*, *supra*, subject to certain rates as maxima.

[40] *Supra*, p. 42.

An example will show how the laminated scale prescribed by the Commission is used: From point X in Official Territory to point Y in Western Trunk-Line Zone III the first-class rate is $2.57. The short line distance is 1,000 miles, of which 125 miles is in Eastern Territory, 200 miles in Western Trunk-Line Zone I, 156 miles in Zone II, and 519 miles in Zone III. The rate is constructed as follows:

	Cents
Basic scale for entire distance in both Official and Western Trunk-Line, 1,000 miles	191
Zone I differentials for distance in Zones I, II, III, 875 miles	26
Zone II differentials for distance in Zones II, III, 675 miles	23
Zone III differential for distance in Zone III, 519 miles	17
	257

Between the part of Official Territory lying east of Indiana, including the southeastern corner of Michigan mentioned above, and Western Trunk-Line Territory, key-point rates were prescribed by the Commission in the *Western Trunk-Line Class Rates* case, *supra.*[a] In this case rates were prescribed between 90 key points in Official Territory, and 193 key points in Western Trunk-Line Territory, including several points in Wyoming. These key-point rates are related to the basic distance scale and zone differentials explained above, but are different therefrom because the rates take into account long-established custom, and water and other competition.

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[a] To and from Utah, Montana, and points in Wyoming west of Cheyenne, Casper, and Sheridan, key-point rates were not prescribed, but the rates were constructed by use of the Western Trunk-Line distance scales and formula.

The class rates between points in Official Territory and points in the eastern part of Western Trunk-Line "alternate" with (meaning that rates may be figured by more than one method and the lowest may be applied for the movement of the traffic) rates made up of a combination of the class rates applicable within Official Territory to or from the Mississippi River crossings and a special scale of "bridge arbitraries" (so called because they "bridge" the great differences between the rates prevailing within the rate territories; in this case to meliorate the abrupt increase resulting from applying the Western Trunk-Line rates immediately west of the Mississippi River in contrast with the relatively low Official scale of class rates). When the rates made on this combination are lower than those made on the normal basis described above, the lower combination rates apply to points not more than 170 miles west of the eastern boundary of Zone I, or approximately 170 miles west of the Mississippi River.

This very complex situation is one of the many results of attempting to adapt the separate regional class rate structures to the movement of traffic between the territories.

Lake-and-rail rates lower than the all-rail rates have been provided for by the Commission to apply between the eastern portion of Eastern

Territory, and points in Western Trunk-Line Territory.[42] These rates apply to rail routes through the western lake ports of Duluth, Chicago, and Milwaukee, and the eastern lake ports of Cleveland and Buffalo. In these rates the principle is followed that as the water haul becomes a smaller part of the total haul, the difference under the rail rates decreases.

(iii) *Between Western Trunk-Line and Southern Territories.*

For the purpose of making interterritorial rates between these two territories, the boundaries of both are slightly different from those shown on the map opposite page 18. Southern Territory loses part of Kentucky, and Western Trunk-Line includes Extended Zone C in Wisconsin that is normally part of Official Territory.

No distance or mileage rate scales were established by the Commission to apply between Western Trunk-Line and Southern territories;[43] key-point rates were prescribed between many important points. In the South, 114 key points were designated, and in the West, 218. Other points were required to be grouped with the key points, or given rates related to the key-point rates, and the carriers were allowed to select additional key points and establish rates at those points reasonably related to the established key rates.

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[42] *Lake and Rail Class and Commodity Rates*, 205 I. C. C. 101 (1935); 214 I. C. C. 93 (1936).

[43] The class rates between Western Trunk-Line (except Zone IV) and Southern territories resulted from *Western-Southern Class Rates*, 226 I. C. C. 497 (1938); 231 I. C. C. 315 (1939); 232 I. C. C. 81 (1939); 238 I. C. C. 681 (1940). A brief history of the structure is found in 164 I. C. C. 1, 42–43.

These key-point rates are about the same as the rates made on the Southwestern and Western Trunk-Line rate scales, computed according to the Western Trunk-Line formula of laminated rates. The key-point rates are also influenced by long-established rate relationships and the necessity of avoiding great disparities at territorial boundaries. A scale of arbitraries was provided for use on various weak and short-line railroads in the South.

(iv) *Between Western Trunk-Line and Southwestern Territories*[44]

Extended Zone C in Wisconsin is treated as part of Western Trunk-Line Zone I for the purpose of establishing class rates between these territories. Between 135 points in the Southwest, and 78 points in Western Trunk-Line, key rates have been established at levels equal approximately to rates made on the basis of the Western Trunk-Line formula of laminated rates. Other specified points were grouped with the key points, and further grouping of points with key points was authorized, but with restrictions on the size of the groups.

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[44] The basis for constructing class rates between these territories was prescribed by the Commission in *Consolidated Southwestern Cases*, twenty-first supplemental report, 205 I. C. C. 601 (1934).

Between points not given key-point rates, and points not grouped with key points, class rates were set up on a distance basis in which the scales in the various zones were used. To explain this fully would entail a long, technical discussion not necessary here.

The voluntary elimination by the rail lines of Southwestern Zone IV, effective in 1941, resulted in rates to and from former Zone IV on the Zone III basis.

(v) *Between Southwestern and Official Territories*[43]

Key-point rates were prescribed which were indicated as maximum reasonable rates for application between these territories; there were 135 key points set up in the Southwest, and 83 in Official Territory. Provision was made for additional key points.

Between points in Central Territory and points in Southwestern not provided with key-point rates, the class rates prescribed by the Commission as maximum reasonable rates were to be computed by applying the Western Trunk-Line basic scale for the entire length of the haul, plus the zone differentials according to the Western Trunk-Line formula, explained previously.

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[43] The class rates between these territories are made on the basis prescribed by the Commission in the *Consolidated Southwestern Cases*, twenty-first supplemental report, 205 I. C. C. 601 (1934). History of the rates prior to these cases is found in the original report, 123 I. C. C. 203, 218.

On rail routes over the Mississippi River, with crossings at Memphis and south, a system involving bridge arbitraries similar to those used between Official and Western Trunk-Line, but higher, is in use.

Rates applicable on ocean-rail movements between groups of points in New England and Trunk-Line, and key points in the Southwest, have been set up by the Commission.[46] These are constructed on a distance basis, the difference under the rail rates decreasing as distance from the Gulf increases.

(vi) *Between Southern and Southwestern Territories*[47]

This class rate adjustment follows the pattern of other interterritorial rates to and from Southwestern Territory. Between 48 key points in Southern Territory (none in the western part), and 135 points in the Southwest, key points were prescribed and other key points authorized. Between points in the South not having key rates, and points in the Southwest, the Western Trunk-Line Zone II scale applies, plus zone differentials, using the Western Trunk-Line formula.

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[46] *Consolidated Southwestern Cases*, twenty-third supplemental report, 211 I. C. C. 601 (1935).

[47] Prescribed by the Commission in *Consolidated Southwestern Cases*, twenty-first supplemental report, 205 I. C. C. 601 (1934).

Between points in Southwestern Territory, and east-bank Mississippi River crossings, Memphis and south thereof, the rates were not to exceed those constructed by the Zone III scale, plus the differentials for the distances in Zone IV. Now that Zone IV no longer exists in the Southwest (p. 44, *supra*) Zone III rates have been authorized for the former Zone IV area.

Between points in Southern Territory, and points in the Southwest not over 170 miles from the Mississippi River crossings, Memphis and south, the first-class rates may not exceed the rates applicable east of the crossings plus the so-called bridge arbitraries.

(c) Commission's class rate findings

The Commission's ultimate findings on class rates are that the intraterritorial rates within each of the territories involved violate Section 1 (4) and (5 (a)) of the Interstate Commerce Act; that the interterritorial rates between each of the territories involved violate these same statutory provisions; that the relation between the interterritorial class rates to Official Territory from the other territories involved, on the one hand, and the intraterritorial class rates within Official Territory, on the other hand, results in an unreasonable preference to Official Territory as a whole, and to shippers and receivers of freight therein, in violation of Section 3 (1) of the Act;

and that reasonable and nondiscriminatory rates, to cure the unlawfulness found to exist above, will be those rates based on the scale of first-class rates set out in Appendix 10 to the Commission's report, with scales of rates for classes other than first class based on the new uniform classification percentages prescribed as fair and reasonable in the classification section of the Commission's report, these new revised uniform class rates to become applicable simultaneously with the new revised classification (R. 315-7).

In view of the necessary delay in the effective date of the permanent class rate adjustment prescribed by the Commission, due to the Commission's finding that the new class rate structure must wait on the new uniform classification, the Commission prescribed an interim class rate revision which would have become effective on January 1, 1946, but for the District Court's interlocutory injunction (R. 317-21). The interim revision, in effect, reduced class rates within Southern, Southwestern, and Western Trunk-Line territories, and between them and Official Territory, 10 percent, subject to certain minima, and increased class rates within Official Territory 10 percent as maximum scales, pursuant to the Commission's power under Section 15 (1), the Commission having "found the classification ratings and class rates involved in this proceeding to be unjust and unreasonable, and unduly and unreasonably preferential and advantageous" (R.

317). The Commission, at the time of the filing of its report, simultaneously filed an order putting into effect this interim revision.

The preliminary class rate findings of the Commission, on which the ultimate findings and order were based, precede in the report the ultimate findings (R. 302–15). They are not numbered or sharply distinguished, but the major findings of the Commission seem reducible to six main points, to which the discussion of the evidence can and will be keyed:

(1) Class rates within Southern and Western territories, and from these territories to Official Territory, are much higher, article for article, than the rates within Official Territory.

(2) Higher class rates have impeded (a) the development, and (b) the movement, of class rate traffic within Southern and Western territories, and from these territories to Official Territory, and thus have made all the class rate structures involved in this proceeding obsolete.

(3) Comparative costs of transportation service do not justify the existing class rate differentials.

(4) Differing consists and volumes of traffic within the territories are no justification for the class rate differentials.

(5) Equalizing the class rates of the territories is not dependent on equalizing the non-class rates.

(6) Interterritorial rate problems are insoluble without uniformity of class ratings and rates.

SUMMARY OF ARGUMENT

I

Congress, in 1940, gave the Interstate Commerce Commission a mandate to remove all undue discriminations in rates as between territories, i. e., to bring about rate uniformity, if it found after full investigation, that transportation conditions were not sufficiently different to require rate differentials.

II

The Commission, after an elaborate investigation of the class rate structure within each of the four rate territories east of the Rocky Mountains, and an appraisal of the effects of 12 years' experience with the class rate uniformity *within* territories, which had been laboriously worked out during the 20's and early 30's, found that the class rate and classification differences between the territories were so great that the levels of class rates were almost 40 percent higher in the South than in Official Territory, and from 50 to 60 per cent higher in the West than in Official Territory; that these rate differentials, which also adversely affected shippers seeking to market their goods in Official Territory by shipping from other territories, were causing serious injuries and unlawful discriminations in many specific instances; that the higher class rates in the South and West had impeded industrial development in those areas and thus prevented the shipment of manufactured products from and within those territories; and that the class rates paid in the South and West were so high that, for practical purposes, they had become obsolete and were no longer serving the purposes for which they had been designed, namely, setting the patterns for the entire rate structures and providing rates on which products could actually move. The Commission, as the result of the most ambitious transportation costs study ever undertaken, concluded that there were no substantial differences in transportation costs within the several territories, and that costs differentials requiring rate differentials were therefore lacking; that consists and volumes of traffic within the several territories were not sufficiently different *for revenue purposes* to justify the existing class rate differentials or, in fact, any class rate differentials; and that it was appropriate for the Commission to deal with the class rates separately from other kinds of rates, just as it had in each of the previous regional class rate investigations, without the necessity of trying to revise the entire rate structure for the nation in one proceeding. The Commission recognized the chaos in interterritorial rate-making which had been brought about by the independent development of a separate classification and class rate structure for each territory, and concluded that interterritorial rate problems were insoluble without uniformity of classification ratings and class rates. All of these conclusions are amply supported by the evidence in the record before the Commission.

III

The Commission made adequate preliminary findings, as outlined above, to support its order that class rates, pending the accomplishment of uniformity of classification and class rates, should be cut 10 per cent in the South and West, and interterritorially, and raised 10 percent in Official Territory. The raising of rates does not require a finding that existing rates are noncompensatory, especially where a discrimination has been found to exist, and even if such a finding is necessary, it is satisfied, in this case, by the finding that revenue levels in Official Territory are unduly low compared with those of the other territories.

IV

The scope of judicial review in this technical and complex rate adjustment is narrow and limited. The order carries a strong presumption of validity, and this Court has repeatedly disclaimed both technical competence and legal authority to interfere with and pass upon the wisdom of the expert judgment of the Commission in orders involving elaborate and delicate rate structures.

V

The Commission had jurisdiction over the subject matter, and proceeded in strict compliance with its statutory authority, in finding existing rates unreasonable under Section 1 of the Interstate Commerce Act, in finding undue discrimination in violation of Section 3 of the Act, and in prescribing "the" rates for the future under Section 15 of the Act. In so finding and prescribing, there was no necessity and, under the circumstances, no possibility of allowing to the carriers alternative methods for removing the unlawful discriminations. All the discriminations found to exist were controlled by the same carrier group—the carriers of Official Territory, which made the intraterritorial rates of that territory, and controlled the joint rates into that territory from the South and West. Further, the alternative remedy and common control necessity doctrines depend largely on the majority opinion in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, on the validity of which the strong dissent casts grave doubt. Also, that case was decided before the legislation of 1940, under which the power of the Commission to correct territorial discriminations seems to have been made independent of any necessity of the carriers involved in the two sides of the discrimination being the same, or under common control, because the different territories almost by definition contain different groups of carriers.

VI

The new less-carload rates in the West cannot be regarded as confiscatory. When considered from a proper costs accounting standpoint, they bear no more than their proper share of costs. They also are largely within the control of the carriers, due to voluntary rate reductions by the carriers for large segments of less-carload traffic, and the carriers' control over the classification and over the expenses of handling this traffic, like light versus heavy loadings. Further, no Nation-wide rate structure can make every shipment on every mile of every road move at a profit, and it was a rate structure on a nation-wide basis that the Commission was dealing with and building. Courts are always reluctant to nullify rates until they have been given a fair test of experience. The evidence introduced in the District Court was not persuasive or of a character which would support a finding of confiscation to nullify the order of the Commission in its entirety, and appellants all insist that the Commission's order is indivisible. Changes of conditions since the Commission's decision, notably the general freight rate increase authorized by the Commission effective January 1 of this year, fortify the Commission's order rather than impugn it.

ARGUMENT

I. CONGRESS IN 1940 GAVE THE INTERSTATE COMMERCE COMMISSION A MANDATE TO BRING ABOUT FREIGHT RATE UNIFORMITY BETWEEN RATE TERRITORIES, UNLESS CONDITIONS WARRANTED TERRITORIAL RATE DIFFERENTIALS

Against the background of the complicated and chaotic class rate structures above described, Congress, in 1940, finally realized that the hand of the Commission needed strengthening, and that piecemeal rate patchwork along the traditional lines could never adequately deal with the basic vice of regionalism and its attendant inequalities and discriminations. It accordingly undertook to remove any doubts about the power of the Commission, as a *national* rate body, to deal with the rate structures on a national instead of a regional basis, so that out of territorial and subterritorial puzzle pieces which did not fit and never could be made to fit, the Commission could build a national rate structure.

To effect this purpose, Congress extended the scope of Section 3 (1) of the Interstate Commerce Act so as to prohibit any undue or unreasonable preference or advantage to any "region, district, or territory"; and by Section 5 (b) of the 1940 Act, the Ramspeck resolution, it directed the Commission to institute an investigation of interterritorial and intraterritorial rates and to remove any unlawfulness found to exist.

Unjust discrimination in various forms was the principal evil aimed at in the original Interstate Commerce Act. *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740. As originally enacted, and until 1940, Section 3 (1) did not, in terms, specifically prohibit discrimination against a region, district, or territory.

Until 1935, Section 3 (1) specified only a "person, company, firm, corporation, association, locality, or particular description of traffic," as prohibited objects of discrimination. The only word in that series that refers to a geographical unit is "locality." The word "locality" was held not broad enough to include a port district in *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, and therefore, in 1935, Congress added to this series the following items: "port, port district, gateway, transit point."[48]

These words, especially after the *Texas & Pacific* case, seemed not broad enough to cover territories as a whole, which, of course, by 1940 were well recognized as words of art in the railroad regulation field, and the Act was further amended in 1940. The legislative history of the Amendment made to Section 3 (1) in 1940 shows quite clearly that Congress was aware of the limited application of the earlier language and sought to remove this limitation by broadening the language of the statute.

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[48] 54 Stat. 902, 49 U. S. C., Sec. 3.

This legislative history shows plainly two propositions; (I) That Congress itself was not trying to enact territorial rate uniformity, regardless of differences in territorial conditions; and (II) that Congress was trying to prohibit and remove all territorial rate differences not justified by differences of territorial conditions, after the extent of such territorial discriminations had been ascertained by the Commission investigation directed by the Ramspeck resolution.[46] To the extent unlawful discriminations were found to exist and were removed, the Commission would necessarily be creating a greater degree of uniformity in territorial rates.

All of appellants' legislative history is designed to support Proposition I. The Government does not deny this proposition. The legislative history set out below is designed to support Proposition II. Appellants do not appear to deny this proposition. Thus, there is no real issue between the parties about what Congress intended, as evidenced by the legislative history, all of which is perfectly consistent if these two propositions are accepted.

Passing from the question of what Congress intended, to the question of what the Commission thought Congress intended, appellants in No. 345 say (Brief, p. 3) that the Commission concluded that, solely by virtue of the 1940 legislation, "all the existing territorial differences in costs of transportation, density of traffic, composition and consist of traffic could and should be disregarded and flat uniform class rates made effective everywhere." Certainly the Commission *said* no such thing. The Commission devoted a large part of its report to its findings on costs, consists, and other transportation conditions, and this is hardly compatible with the notion that these conditions were irrelevant. What appellants really are saying is that the evidence showed differences of conditions which made the Commission's action arbitrary. But this would not be a mistake of law—a misunderstanding of the 1940 legislation. It would be a mistake about what the evidence showed. Thus, the real issue is what the evidence showed, i. e., if it showed that territorial transportation conditions were or were not so substantially different as to justify the existing differences in class rates.

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[46] In this portion of this brief we are assuming, as Congress assumed, that unjustified differences in rates as between territories and regions will be harmful to the territory or region discriminated against. That this was so in this case is shown *infra*, pp. 175–204.

Appellants in No. 345, in their legislative history argument, first cite the recommendation of the Committee of Six that the Commission should remain free to prescribe different rates for different sections of the country, and they go on to point out how the Commission itself asked Congress to allow it to keep this freedom of judgment.

Appellants then explain how the Congressional committees considering this legislation rejected other bills and amendments which would have required territorial rate uniformity regardless of differing territorial conditions, and as a matter of congressional fiat. Appellants next point out how Senator Wheeler and Representative Lea assured Congress that such was not the purpose of the Committees' amendment to Section 3 (1). There is no dispute about any of this. As Senator Wheeler pointed out, in language quoted by appellants (Brief p. 140), "The Congress of the United States cannot make rates. The Congress must provide for a commission which will make rates. * * * The Senate cannot investigate to ascertain whether discriminations exist in one particular territory or in another particular territory."

It must be recognized that when the 1940 legislation was enacted, no one in Congress knew, any more than the Commission knew, to what extent territorial rate differences were justified by different territorial conditions, and this could not be known until the Commission had completed its investigation and made its findings. This lack of knowledge accounts for some of the statements by Senator Wheeler which are quoted and relied on by appellants. Thus, when Senator Frazier asked him if it was the expectation of the committee "that by the amendment * * * the rates in the various classification territories will be equalized," and Senator Wheeler replied, "I do not think that is possible," and explained this answer by stating that costs and density of traffic and other factors would be different in different areas, Senator Wheeler was merely saying that he thought the Commission would find that some territorial conditions were so different from others that rate differences would be required. (Brief, p. 138). He was not saying, and surely could not have intended to say, that if the Commission's full investigation disclosed that he had been wrong, and that costs and other conditions did not differ substantially between territories, rate differences unsupported by differences of conditions would still be maintained. Senator Wheeler's subsequent statement, quoted by appellants, that "the bill does not mean that rates are to be equalized," must also be read in this light. Congress was not equalizing rates, or stating that they "are to be equalized" by the Commission, regardless of territorial conditions.

The following quotations will, it is submitted, show conclusively that Congress was trying to eliminate whatever unlawful territorial rate discriminations were found on investigation to exist, and to that extent to bring about a greater degree of equalization and uniformity in territorial rates. That the investigation by the Commission would disclose that none of the territorial class-rate differences were justified by different territorial conditions was a result which neither Congress nor the Commission could have anticipated, and it was certainly not a result which Congress directed the Commission to reach, regardless of its findings. Appellants in No. 345, when they argue so vigorously and at such length on what they call the question of setting uniform rates on a distance factor alone, in disregard of territorial differences in transportation conditions, are wasting words on an issue which is not, and never was, in this case.

The amendment of 1940 to Section 3 (1) was contained in Senate bill S. 2009. That bill was reported favorably by the Senate Committee on Interstate Commerce in Report No. 433, 76th Congress, 1st Session, and presented to the Senate by Chairman Wheeler of that Committee on May 16, 1939. At page 11 of that report, the Committee stated with respect to Section 3 (1): "There has been no substantial change therein, except that the words 'region, district, and territory' appearing in lines 20 and 23 on page 26 have been inserted." In explanation of this amendment, Chairman Wheeler said to the Senate on May 22, 1939: "The previous provisions with regard to 'discrimination' simply referred to discrimination as to 'locality, port, port district, gateway, transit point' without specifying the region, district or territory. So, we felt that by broadening the language we would at least take away that excuse, and we would provide expressly that the Commission should not discriminate in its rate structures" (Cong. Rec., vol. 84, part 6, p. 5889, 76th Cong., 1st Sess.).

On the same day, Senator Pepper asked the following question of the Chairman:

> I wonder if it is not also within the ambition of the Chairman of the Committee and the Committee that there may be something like equality for the whole country with respect to transportation facilities and transportation rates. In other words, should not every section of the country be allowed to develop economically according to its own merits, rather than through the fortunate instrumentality of a freight-rate structure which makes it possible for one section to grow and makes it obligatory that another section shall forever be retarded in its opportunity to grow?

In answer to this question, Senator Wheeler replied:

> I thank the Senator for his contribution, and I agree with him, of course. Various freight-rate structures grew up because of the fact that big shippers or localities received favorable treatment. There was discrimination against certain localities. That was one of the reasons why we created the Interstate Commerce Commission (84 Cong. Rec. 5890).

This bill was debated further in the Senate on May 24, 1939. With respect to another amendment looking toward rate equalization by Congressional fiat, that had been proposed by Senator Miller of Arkansas, Chairman Wheeler said:

> The amendment, in my judgment, would not do what the Senator from Arkansas wants to do with reference to discrimination. Let me say to the Senator that the amendments we have already put into the bill go much further toward accomplishing the purpose the Senator has in mind than would this amendment. I am in thorough accord with the statements made by the Senator from Arkansas with reference to discriminations. I think they ought to be stopped, and if the Commission pursues the investigation and follows what we have laid down in this bill, many of the discriminations between territories will be eliminated. A great many are absolutely arbitrary, and it seems to me without any justification (84 Cong. Rec. 6071–2).

Thereupon, Senator George commented as follows:

> I am glad to hear the distinguished Senator make that statement, because it seems to me to be more important, and I dare say it is more important as the coming days of the Congress must demonstrate, that we establish just and nondiscriminatory rates between the various regions than to continue even a rate that may not be justified in a particular region.

On the same page of the Record (6072) is found this question directed by Senator George to Senator Wheeler with respect to the amendment of

Section 3 (1) of the Act: "The Senator thinks that it will make toward the equalization of rates in the various regions?" To this question, Senator Wheeler replied: "I do not think there is any doubt about that at all, because that is the purpose of the bill; it is the intention of the bill."

This bill (S. 2009) passed the Senate on May 25, 1939, and was sent to the House. After its consideration by the House Committee on Interstate and Foreign Commerce, Chairman Lea of that Committee reported it out without relevant change in the amendment to Section 3 (1) of the Act that had been approved by the Senate. (See Brief p. 147.)

In addition to the amendment to Section 3 (1), a provision designated as Section 5 (b) of the Transportation Act of 1940 was adopted.[50] It "authorized and directed" the Commission to investigate "the rates on manufactured products, agricultural commodities, and raw materials," between and within classification territories, for the purpose of determining "whether such rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness found to exist."

In a letter of January 29, 1940, concerning S. 2009, printed as a public document, the Commission advised the Congress that its investigation instituted in 1939, here involved, would be carried out pursuant to this mandate of Congress.

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[50] 54 Stat. 902, 49 U. S. C., Sec. 3, *note*.

During the debate on the floor of the Senate on May 22, 1939, concerning this provision which subsequently became Section 5 (b) of the 1940 Act, Senator Wheeler stated: "The Commission is directed to proceed immediately[51] . . . At the present time, however, I feel that as far as we could go would be to direct the Commission to investigate, and then to put into effect any orders necessary, and then to broaden the other section with reference to unjust discrimination" (84 Cong. Rec. 5889). Chairman Lea said to the House on July 21, 1939, in presenting Section 5 (b): "Now I want to refer for a moment to the Ramspeck resolution (which became Section 5 (b)). That is embodied in this bill. It directs the Interstate Commerce Commission to make an investigation of certain freight differentials, and then to make the orders that are necessary to remove the unlawfulness of rates found to be unlawful. It further provides, in the provisions prohibiting discriminations, the protection of territories and districts. In my judgment that resolution is directed at what is one of the most important situations in rate structure. It points to a place in our rate structure where the greatest opportunity to help our transportation system on an economic basis lies. The correction of that condition would serve the interests of shippers and carriers alike" (84 Cong. Rec. 9705).

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[51] Commission hearings in the *Class Rate Investigation* had not yet been announced or started.

Congress also adopted, as part of the Transportation Act of 1940, a declaration designated as the "National Transportation Policy."[52] In general terms, Congress undertook to express its policy to govern the regulation of all modes of transportation, and required that all provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out that policy. One of the declared purposes in this declaration of policy is "to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

On July 26, 1939, the House passed S. 2009 as amended, and sent it to conference with the Senate. After the conference report had been adopted by the Senate, Senator Hill, Chairman of the subcommittee that had held hearings on the measure, stated to the Senate on September 9, 1940, with respect to the amendments here considered: "Under these amendments any undue or unreasonable preference or advantage of one region, district, or territory over another region, district, or territory is made unlawful and prohibited and the Interstate Commerce Commission is directed to investigate immediately and upon finding such undue or unreasonable preference or advantage to exist to enter such orders as may be necessary for the removal of same. Under these amendments now to become the law of the land the unjust and unfair discriminations between sections in freight rates should be removed and all sections of our country permitted to enjoy that development and prosperity to which the character and genius of their people and their natural resources entitle them" (86 Cong. Rec. 5553).

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[52] 54 Stat. 899, 49 U. S. C., *note* preceding sec. 1.

Appellants insist that the Commission has misconstrued Section 5 (b) of the Transportation Act of 1940 as extending its power beyond that granted by other provisions of the Interstate Commerce Act. Such was not the case. On the contrary, the Commission predicated its report and order squarely and solely upon Sections 1, 3, and 15 of the Act.

Except for the amendment to Section 3 (1), the Commission has not treated any of the 1940 amendments as extending the scope of its powers. The National Transportation Policy and Section 5 (b) were referred to only for the purpose of emphasizing their real relationship to the amendment made to Section 3 (1) in 1940, as is clear from the language used by the Commission in its report:

> Considering the breadth of the language used in the amendments here under consideration, the evils sought to be cured by

this legislation, the history of the times when the law was amended, as well as the statements of the legislators as to the purposes of the amendments—all proper aids of statutory interpretation—it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country. The method employed to accomplish this purpose is equally plain. By the amendment to the substantive antidiscrimination provisions of section 3 (1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if not justified upon proper consideration of recognized elements of rate making applied in the light of the amended law are unlawful and should be corrected. (R. 306–7.)

Appellants rely primarily on *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658. The Court's opinion in that case itself disposes of this contention. There the rates under attack had just been declared by the Commission to be lawful. The Hoch-Smith Resolution had utilized language which led the Commission to believe that a new standard of lawfulness had been created by Congress to apply to rates governing the transportation of agricultural commodities, and that the Commission was required by the provisions of the Hoch-Smith Resolution to depart from the ordinary rules of rate-making. The Court's opinion makes this quite clear (281 U. S. at 667–668):

> The original and supplemental opinions of the commission show quite plainly that the commission based the order entirely upon the joint resolution. * * *
>
> The third paragraph was construed by the commission as making a change "in the basic law," as placing agricultural products in a "most favored" class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers "have not as yet made the fair return" for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system. Indeed, it is apparent from the commission's opinions that it regarded this paragraph as requiring it

> to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections, 1 (5) and 3 (1), of the existing law.

A comparison of the language used by the Commission in the report involved in the case at bar, quoted above, with the language just quoted from the *Ann Arbor* case, shows clearly that the *Ann Arbor* case is not controlling here. Here the Commission construed the Ramspeck resolution only as a directive to investigate and correct violations of substantive law as defined elsewhere in the Act, and not, as in the case of the Hoch-Smith resolution, as a change, by resolution, of substantive law.

Appellants contend that the evidence before the Commission did not support the finding of discrimination between territories, on the ground that too few shippers testified they were discriminated against. This contention exposes the error that has led appellants to insist that the 1940 amendment to Section 3 (1) did not change the law. For whether two shippers, or two thousand shippers, had testified they were discriminated against, such evidence by itself, unless the Commission found these shippers could speak for every interest in the territory, would only have supported a finding of discrimination against "any particular person, company, firm, corporation, association"—objects of discrimination that were protected by the Act as it stood before 1940, and thus requiring no amendment of the Act for their protection.

Before 1940, the only protected object of discrimination having geographical significance was "locality."[53] "Locality" implies a particular place as distinguished from a general area, e. g., "local anesthetic," or "local election." Furthermore, in the *Texas & Pacific* case,[54] locality had been given a much narrower meaning than its usual one, when it was held not to include a port. Therefore, in 1940, Congress, which had not prohibited all discrimination, but only discrimination against enumerated objects, added as new objects of protection "region," "district," and "territory."

The distinction between a freight rate discrimination against a shipper and a freight rate discrimination against a territory is, from the point of view of the Commission, largely a distinction in method of proof. Discrimination continues to mean the same thing. The reason that proof of discrimination against two shippers in a territory, or two thousand shippers, would not of itself establish discrimination against a territory, is that a territory is an entity, a word of art in railroading, and discrimination against it involves its shippers, receivers, consumers, localities, and entire economy. Appellants undoubtedly would have complained, if the Commission had used the testimony of individual shippers, no matter how many, as the sole basis for a finding of territorial discrimination.

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[53] Except "port," "port district," "gateway," "transit point," which obviously are inapplicable to territories.

[54] *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, *supra*.

Whether the 1940 amendment to Section 3 (1) made a change in the substantive law by prohibiting discrimination against territories, against which the law, before 1940, freely permitted discrimination, as held by the court below (and it is submitted that this is the better view of the 1940 amendment, because otherwise it means nothing), or whether the 1940 amendment was merely declaratory, the Commission clearly had the power in this proceeding to inquire into discrimination between territories, and the duty, having found such discrimination to exist, to remove it. The Commission took the view that the 1940 amendment to Section 3 (1) meant something. If this was error, it was harmless error. The Commission was directed by the Ramspeck resolution to investigate discrimination between territories and to remove any discrimination found to exist. The Commission thus considered, and rightly considered, that Congress in 1940 had given it a mandate to investigate, and a new object of discrimination to protect, if investigation showed that territorial discrimination existed.

The report will be searched in vain for any suggestion that the Commission considered itself obligated to create national uniformity of rates irrespective of circumstances and conditions.

Appellants say the Commission construed Section 3 (1) as requiring equalization of rates irrespective of circumstances. This contention has already been dealt with. They say, further, that equality is only justified if circumstances and conditions are substantially the same. But the latter is also the Commission's position. This issue, or lack of an issue, has been obscured to a remarkable extent by the reiteration of appellants' theme of the "mistaken idea of the Commission that Congress had issued a mandate to equalize rates". The fact is, obviously Congress did issue a mandate to the Commission to equalize rates. Equally obviously, this mandate had a qualification, inherent in the mandate and fully recognized by the Commission, but slurred over or omitted by appellants in their repetition of the theme of the mistaken idea of the Commission about the congressional mandate of rate uniformity, mile for mile.

Section 3 (1) has always been an unequivocal, though qualified, mandate for rate uniformity. The very thing Congress sought to achieve by Section 3 (1), starting in 1887, was equality of rates. Railroads were required by the original Section 3 (1) to charge equal rates to different persons, and prohibited from charging them different rates, in the absence (and, of course, this is the necessary qualification) of different circumstances requiring that these persons be given different treatment. If two persons under equal circumstances were shipping the same kind of freight from one point to another, they had to be treated equally. Of course, if the freight were of a different kind, or if the mileage or points were different, these or other differences might warrant a rate differentiation, but lacking substantial differences of circumstances, the essential mandate of Section 3 (1) would control.

What else could the prohibition against discrimination in Section 3 (1) mean except a mandate for rate uniformity under substantially similar circumstances? And where Section 3 (1) from its inception has been a mandate to the Commission to equalize rates as between persons, it became, in 1940, a mandate to equalize rates between regions and territories, subject always to the same inherent qualification. Of course Section 3 (1) is a mandate to rate uniformity and equalization. Congress has told the Commission to enforce equality of rates—not *regardless* of surrounding circumstances, but equality *unless* surrounding circumstances require rate differentiations.

The Commission did not describe the 1940 amendments as a mandate or direction to bring about rate equalization and uniformity, or issue an order going that far. What it did was to recognize a mandate or direction to bring about "a greater degree" of equalization and uniformity. Thus, instead of going beyond the limits of the congressional mandate, as appellants would have this Court believe, the Commission cautiously took action which fell short of the limits to which it could, and perhaps should, have gone. However, the result was the same. The Commission made its investigation as to whether or not discrimination existed between territorial rate levels, in a spirit, as shows plainly throughout the report, of an inquiry into the facts to see whether or not the admitted inequalities in the rate levels were required by substantially different conditions, or whether conditions between the territories were so similar that differences in rate levels could only be regarded as violations of the mandate of Section 3 (1) that rates must be equal and uniform, in the absence of substantially different conditions affecting consists, costs, etc. If Section 3 (1) is construed as we believe it must be, the only difference between the position of the Government and that of the appellants is whether or not the findings of the Commission that there were no conditions justifying territorial rate inequalities were supported by the evidence.

Having described the rate situation with which the Commission was confronted in 1939, which cried very loudly for change, and the impetus Congress gave the Commission in 1940, this brief turns next to the specific findings made by the Commission, and the evidence supporting them.

II. THE FINDINGS OF THE COMMISSION THAT CONDITIONS WITHIN THE FREIGHT RATE TERRITORIES DID NOT WARRANT THE EXISTING TERRITORIAL FREIGHT CLASSIFICATION AND FREIGHT RATE DIFFERENTIALS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

It was pointed out above that the elaborate findings of the Commission may appropriately be grouped into six major findings in connection with class rates, which are set out on page 59, *supra.* The evidence supporting each of these six separate points will be discussed in turn.

(A) *Class rates within Southern and Western territories, and from these territories to Official Territory, are much higher, article for article, than the rates within Official Territory*

The fact that class rates are higher in the South and West than in Official Territory will be demonstrated by a consideration of (a) general levels of rates, and (b) specific rate comparisons in competitive situations, as disclosed by the evidence in the record before the Commission. While appellants finally seem to have conceded this inequality (appellants' briefs, in No. 343 at p. 10, in No. 344 at p. 6, and in No. 345 at p. 4), the Court will want to know in facts and figures the extent of the inequality.

(1) Levels of class rates

The startling differences between territorial class rate levels are illustrated by the first-class rate scales within Official Territory as compared with the first-class rate scales applicable within the South and West (R. 184):

Intraterritorial rates

[In cents per 100 pounds]

Distance	Official scale rate	Southern scale		Western scale					
				Zone I		Zone II		Zone III	
		Rate	Percentage of Official	Rate	Percentage of Official	Rate	Percentage of Official	Rate	Percentage of Official
50 miles	47	57		53		61		65	
100 miles	62	79		73		83		90	
150 miles	73	96		86		98		107	
200 miles	80	112		97		111		123	
300 miles	96	134		117		134		147	
400 miles	109	156		136		156		172	
500 miles	122	173		156		178		196	
600 miles	135	189		176		200		220	
700 miles	149	206		196		222		244	
800 miles	160	222		210		239		263	
900 miles	171	235		226		256		282	
1,000 miles	182	249		240		273		300	
Average			137.7		129.6		144.4		159.4

These first-class intraterritorial rates are indicative of the class rate levels because they apply throughout the different territories and because they are used as a base in formulating rates on other classes of freight. They represent rate comparisons for *intra*territorial traffic, moving within each territory or zone. Comparisons for *inter*territorial movements, however, vary in amount, depending in large measure upon the proportion of the through haul in each freight-rate territory through which the rate-making routes are computed.

On a movement of 800 miles within Official Territory, the table above shows that a rate of $1.60 per 100 pounds applies on first-class traffic, while for the same distance in Southern Territory, the rate is $2.22. If the 800 miles are divided, 600 in Official and 200 in Southern, the rate is $2.00, or 40 cents higher than the normal Official rate and 22 cents lower than the all-Southern.

Examples of interterritorial movements from points in the South and West to Official Territory, as compared with intraterritorial movements for approximately equal distances within Official Territory, show the disadvantages suffered by the Southern and Western shipper attempting to market his product in Official Territory. The following table illustrates these disadvantages on first-class rates for equivalent service. The first comparison, for example, shows that the Nashville shipper pays 39 cents more on each 100 pounds of freight moving to Indianapolis, Indiana, than the shipper at Kent, Ohio (the distance being practically the same), a disadvantage of 41 per cent.

Interritorial rates

[In cents per 100 pounds]

Southern v. Official		Miles	First class rates	Disadvantage of Southern Territory shipper compared with Official Territory shipper	
From—	To—			In cents	In per cent
Nashville, Tenn	Indianapolis, Ind	297	135		
Kent, Ohio	Indianapolis, Ind	296	96	39	41
Knoxville, Tenn	Columbus, Ohio	395	155		
Baltimore, Md	Warren, Ohio	392	103	52	50
Birmingham, Ala	Muncie, Indiana	536	179		
Pittsburgh, Pa	Rockford, Ill	538	128	51	40
Chattanooga, Tenn	Chicago, Ill	594	187		
Philadelphia, Pa	Toledo, Ohio	595	135	52	39
Atlanta, Ga	Chicago, Ill	731	210		
Danville, Ill	Washington, D. C	733	151	59	39
Macon, Ga	Chicago, Ill	819	223		
Trenton, N. J	Danville, Ill	819	163	60	37

Source: Ex. 88, R. 8138-9, 2578.

Southwestern v. Official		Miles	First class rates	Disadvantage of Southwestern Territory shipper compared with Official territory shipper	
From—	To—			In cents	In per cent
Little Rock, Ark	Detroit, Mich	785	222		
Official Territory Point	Detroit, Mich	785	160	62	39
Oklahoma City, Okla	Cincinnati, Ohio	882	244		
Official Territory Point	Cincinnati, Ohio	882	171	73	43
Shreveport, La	Cleveland, Ohio	1,013	264		
Official Territory Point	Cleveland, Ohio	1,013	185	79	43
Dallas, Tex	Pittsburgh, Pa	1,224	304		
Official Territory Point	Pittsburgh, Pa	1,224	207	97	47

Source: Ex. 96, R. 8534, 2746.

Interterritorial rates—Continued

Western Trunk-Line v. Official		Miles	First class rates	Disadvantage of Western Trunk-Line Territory shipper compared with Official Territory shipper	
From—	To—			In cents	In per cent
Des Moines, Iowa	Toledo, Ohio	558	142		
Official Territory Point	Toledo, Ohio	558	118	24	20
St. Paul, Minn	South Bend, Ind	491	138		
Official Territory Point	South Bend, Ind	491	111	27	24
Lincoln, Nebr	Evansville, Ind	612	169		
Official Territory Point	Evansville, Ind	612	125	44	35
Denver, Colo	Cleveland, Ohio	1,329	289		
Official Territory Point	Cleveland, Ohio	1,329	200	89	45

Source: Ex. 64, R. 7556-9, 2175.

All of the foregoing comparisions are of first-class rates, without regard for actual rates on individual commodities. The disparities in rate levels are often intensified when rates on individual, identical commodities are considered.

A classification rating must be complemented by a class rate, and *vice versa,* in order to give substance to either. Therefore, for the purpose of conveying some idea of the effect that the classification differences have upon rates prescribed in territories embraced in this proceeding, illustrative tables are set out below.

The ratings in these tables cover less-carload and carload traffic on a substantial number of items rated class 100 (first class) and various lower classes. The class rates have been taken from the published distance scales prescribed by the Commission. The rates for 200 miles, which is the approximate average haul of revenue freight by Class I railroads per line of railroad, are used.[55] As representative of Western Territory, the rates for Western Trunk-Line Zone 1 are shown. The corresponding rates for Zones II and III are higher by averages of about 14 and 25 per cent respectively.

The following four tables show the effect of classification differences on rates paid on identical commodities in Official Territory compared first with Southern and then with Western Territory, on both less-carload and carload shipments.

Explanation of the initial group of items in the first table will illustrate. This shows that Official Classification in its class 100 (first class) has 2092 items, each of which moves at a rate of 80 cents for a haul of 200 miles. In Southern Classification, 2075 of these 2092 articles are classified first class,[56] moving at a rate of $1.12 for 200 miles. The remaining 17 items are classified in Southern Classification from class 85, with a rate of 95 cents for 200 miles, to class 40, with a rate of 45 cents for the 200 mile haul. Each group in the four tables is made up of similar comparisons (Ex. 167, R. 10469–99, 3780).

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[55] *I. C. C. Statistics of Railways in the United States*, 1939, p. 42.

[56] As already noted, there is substantial classification uniformity in Classes 1, 2, and 3 (100 per cent, 85 per cent, and 70 percent respectively, of Class 1), but not in any of the lower classes.

These tables show that even though the shippers in the South and West may have the same or lower classification ratings for identical articles, they nevertheless pay higher charges than the shippers in Official Territory for equivalent service.

Comparison of Official with Southern classification ratings on identical items with applicable rates

[Rates stated in cents per 100 pounds for 200 miles]

LESS-CARLOAD

Classification and territory	Class	Number of ratings	Rate	Classification and territory	Class	Number of ratings	Rate
Official	100	2,092	80	Official	55	616	44
Southern	100	2,075	112	Southern	85	1	95
	85	5	95		70	2	78
	70	2	78		55	565	62
	55	7	62		50	2	56
	45	2	50		45	27	50
	40	1	45		40	19	45
Official	85	2,672	68	Official	50	995	40
Southern	85	2,600	95	Southern	70	2	78
	70	21	78		55	11	62
	55	42	62		50	682	56
	50	2	56		45	134	50
	45	2	50		40	162	45
	40	5	45		30	4	34
Official	70	2,416	56				
Southern	70	2,390	78				
	55	278	62				
	50	8	56				
	45	26	50				
	40	14	45				

Comparison of Official with Southern classification ratings on identical items with applicable rates—Continued

CARLOAD

Classification and territory	Class	Number of ratings	Rate	Classification and territory	Class	Number of ratings	Rate
Official	100	213	80	Official	40	1,105	32
Southern	100	190	112	Southern	70	1	78
	85	7	95		55	3	62
	75	2	84		45	288	50
	70	5	78		40	809	45
Official	85	706	68		37½	3	42
Southern	100	1	112		35	2	39
	85	575	95	Official	37½	706	30
	77½	24	87	Southern	55	7	62
	70	161	78		45	96	50
	55	4	62		40	561	45
	35	1	39		37½	90	42
Official	70	1,433	56		35	10	39
Southern	85	1	112		17½	2	20
	70	1,328	78	Official	35	2,709	28
	65	11	73	Southern	55	34	62
	60	1	67		45	190	50
	55	73	62		40	1,646	45
	45	10	50		37½	56	42
	40	5	45		35	380	39
	37½	1	42		32½	107	36
	35	1	39		30	204	34
Official	55	1,270	44		27½	28	31
Southern	70	19	78		25	13	28
	55	1,183	62		22½	36	25
	50	19	56		20	1	22
	45	30	50		17½	2	20
	40	13	45	Official	27½	677	22
	37½	3	42	Southern	40	25	45
	30	3	34		37½	2	42
Official	50	1,185	40		35	5	39
Southern	70	3	78		32½	28	36
	55	809	62		30	[illegible]	34
	50	93	56		27½	16	31
	45	204	50		25	25	28
	40	60	45		22½	108	25
	37½	9	42		20	33	22
	35	1	39		17½	77	20
	30	6	34				
Official	45	235	36				
Southern	55	8	62				
	45	315	50				
	40	17	45				

V

Comparison of Official with Western classification ratings on identical items with applicable rates

[Rates stated in cents per 100 pounds for 200 miles]

LESS-CARLOAD

Classification and territory	Class	Number of ratings	Rate	Classification and territory	Class	Number of ratings	Rate
Official	100	2,092	80	Official	70	2,716	56
Western	100	2,076	97	Western	70	2,571	68
	85	4	82		55	145	53
	70	10	68	Official	55	616	44
	55	2	53	Western	85	1	82
Official	85	2,672	68		70	2	68
Western	85	2,625	82		55	613	53
	70	29	68	Official	50	995	40
	55	18	53	Western	85	1	82
					70	3	68
					55	901	53

Comparison of Official with Western classification ratings on identical items with applicable rates—Continued

CARLOAD

Classification and territory	Class	Number of ratings	Rate	Classification and territory	Class	Number of ratings	Rate
Official	100	213	80	Official	45	335	36
Western	100	202	97	Western	55	8	53
	85	7	82		45	323	44
	70	3	68		40	1	39
	55	1	53		37½	3	36
Official	85	766	68	Official	40	4,105	38
Western	100	1	97	Western	70	1	62
	85	587	82		55	5	53
	77½	24	75		45	984	44
	70	152	68		40	32	39
	45	1	44		37½	92	36
	32½	1	32		35	1	34
Official	70	1,433	56	Official	37½	786	30
Western	85	1	82	Western	55	8	53
	70	1,381	68		45	110	44
	65	11	63		37½	644	36
	55	29	53		32½	2	32
	45	8	44		17½	2	17
	37½	3	36	Official	35	2,709	28
Official	55	1,270	44	Western	55	36	53
Western	70	19	68		45	309	44
	55	1,198	53		37½	2,145	36
	50	19	49		35	3	34
	45	31	44		32½	133	32
	37½	2	36		30	83	29
	32½	1	32		22½	23	22
Official	50	1,185	40		17½	7	17
Western	70	4	68	Official	27½	677	22
	55	995	53	Western	45	1	44
	50	57	49		37½	83	36
	45	85	44		32½	136	32
	42½	1	41		30	243	29
	40	3	39		22½	112	20
	37½	29	36		17½	102	17
	35	4	34				
	32½	2	32				
	30	5	29				

While the western carriers vigorously argue that the interstate class rates in the West should not be lowered, and that to lower them would be confiscatory, these same carriers are maintaining *intrastate* class rates that are substantially on the same level as Official Territory class rates, which are generally the same both interstate and intrastate. These western intrastate class rates are being maintained voluntarily by the carriers in the sense that they have voluntarily put them into effect, or have refrained from asking the Commission or a court to raise them, after a State has ordered the present rates.

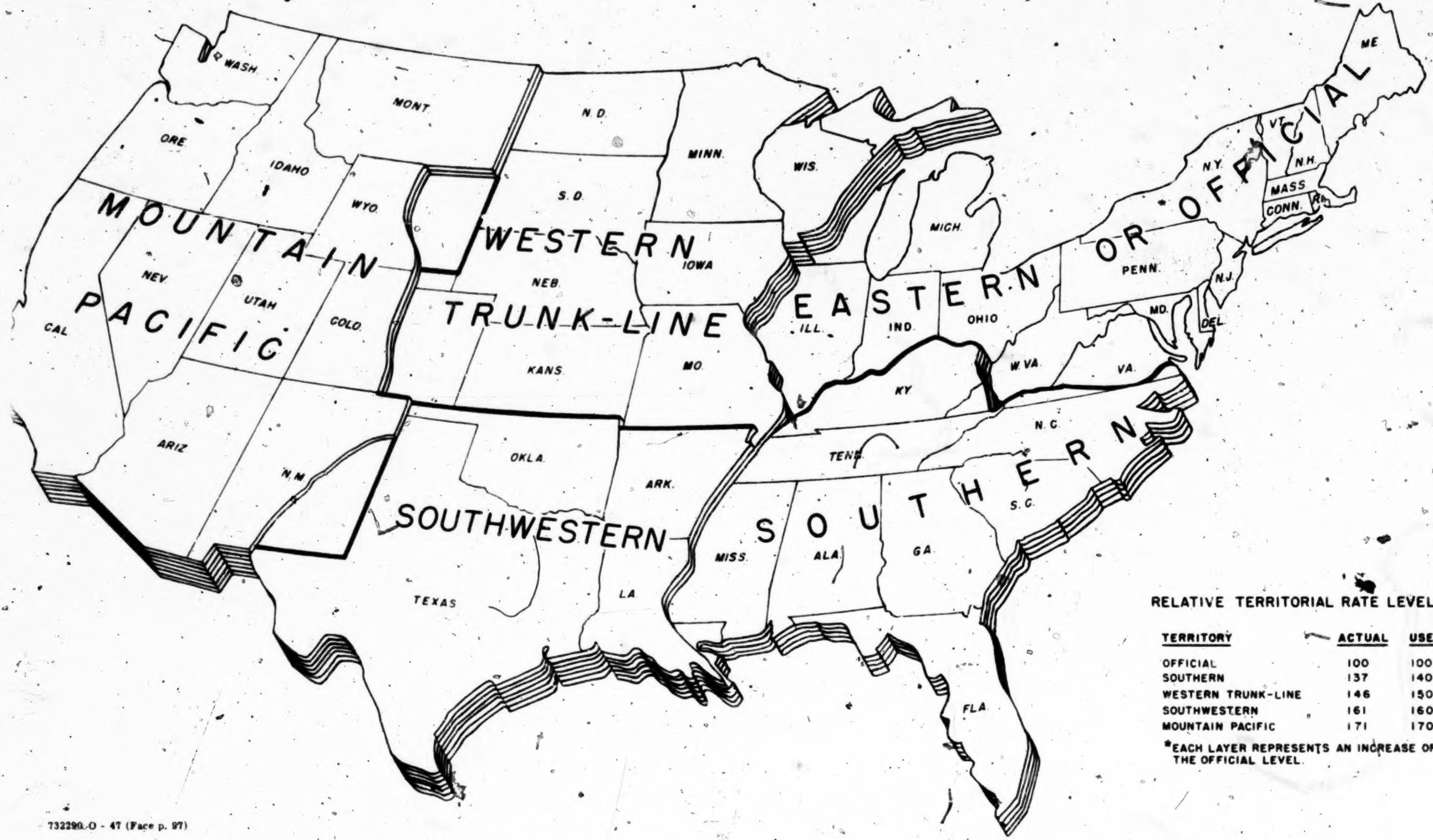
The following table contrasts less-carload rates for representative distances on intrastate traffic for the States listed, with the interstate levels in Zones I, II, and III of Western Trunk-Line, and also with the Official level of rates (R. 170):

Intrastate rates in Western States on class 100 for representative distances, compared with rates in Zones I, II, and III of Western Trunk-Line Territory, and rates in Official Territory

[In cents per 100 pounds]

	20 miles	40 miles	60 miles	80 miles	100 miles	130 miles	160 miles
Wisconsin	30	39	50	57	62	68	75
Iowa	40	48	53	57	62	68	75
Missouri	32	39	46	53	59	66	72
Minnesota	36	44	52	60	66	74	80
North Dakota	22	37	48	54	59	67	75
South Dakota (E)[1]	34	40	46	52	59	68	78
South Dakota (W)[1]	39	46	53	60	68	78	90
Kansas	36	45	54	63	72	85	97
Colorado (Eastern)	42	51	61	69	76	86	93
Arkansas	33	41	48	55	61	69	83
Oklahoma	36	45	54	63	72	85	97
Texas	47	58	69	79	87	99	109
Official Territory	37	44	51	57	62	68	74
Zone I, Western Trunk Line	40	48	57	66	73	81	88
Zone II, Western Trunk line	44	55	65	75	83	92	100
Zone III, Western Trunk Line	47	59	70	81	90	100	110

[1] South Dakota (E) and (W) mean east and west of the Missouri River; for shipments crossing the River, an average of the two scales applies.


MOUNTAIN PACIFIC
WESTERN TRUNK-LINE
EASTERN OR OFFICIAL
SOUTHWESTERN
SOUTHERN
WASH.
ORE.
CAL.
IDAHO
NEV.
UTAH
ARIZ.
MONT.
WYO.
COLO.
N.M.
N.D.
S.D.
NEB.
KANS.
OKLA.
TEXAS
MINN.
IOWA
MO.
ARK.
LA.
WIS.
ILL.
MICH.
IND.
OHIO
KY.
TENN.
MISS.
ALA.
GA.
FLA.
S.C.
N.C.
VA.
W.VA.
MD.
DEL.
PENN.
N.J.
N.Y.
VT.
N.H.
ME.
MASS.
CONN.
R.I.

RELATIVE TERRITORIAL RATE LEVEL BARRIERS

TERRITORY	ACTUAL	USED	LAYERS*
OFFICIAL	100	100	0
SOUTHERN	137	140	4
WESTERN TRUNK-LINE	146	150	5
SOUTHWESTERN	161	160	6
MOUNTAIN PACIFIC	171	170	7

*EACH LAYER REPRESENTS AN INCREASE OF 10% OVER THE OFFICIAL LEVEL.

Some indication of the relations between intrastate and interstate rate levels may be obtained by averaging the class 100 rates in the table for the Western States in each zone, and also computing an average for all the Western States, for a comparison with the Official scale. In Zone I the average intrastate class rates made up from this table are only 86.1 per cent of the interstate class 100 rate scale in effect for the Zone I States, in Zone II, 76.2 per cent, and in Zone III, 77.7 per cent. These average intrastate levels in the respective zones, compared with Official class rate levels, are 99.5, 99.7, and 110.2 per cent of the corresponding class 100 rates in the Official scale, and the average for all the Western States listed in the table is 107.4 per cent of that scale. If the western carriers voluntarily keep their intrastate rates near or below the Official level, why should they complain of confiscation if the Commission undertakes to bring their interstate rates into alignment?

A graphic method of presenting the contrasting levels of intraterritorial class rates was introduced before the Commission by the western carriers themselves (Ex. 66, R. 7579, 7629, 2219). This map has been brought up to date (Ex. 42, R. 6765, 1929) and is shown on the opposite page. It presents graphically a composite of the several intraterritorial class-rate levels. These are the rate barriers which are faced by the South and West.

(2) Specific class rate inequalities

The preceding section of this brief described the unequal *levels* of class rates, principally through use of the first-class scales, unrelated to particular commodities shipped. The following material summarizes some of the testimony showing specific class rate inequalities, in concrete competitive situations, of which, as the Commission found, there was "abundant evidence." (R. 123.)

A Philadelphia shipper of gas black from the Pennsylvania oil fields pays a rate to St. Louis, a distance of 981 miles, of 64 cents per hundred pounds, whereas from Amarillo, Texas, to Chicago, a distance of 978 miles, the rate is 85 cents per hundred pounds. If Amarillo and Philadelphia both ship to Chicago, the rate from Amarillo is 85 cents and the rate from Philadelphia is 57 cents, a difference of 28 cents per hundred pounds, or $112.00 per car for a difference in distance of only 167 miles in favor of Philadelphia. The distance from Philadelphia to Chicago is 811 miles. The rating is fifth class (R. 2795).

Oil well supplies move on class rates and are manufactured at Parkersburg, West Virginia; Fort Worth, Texas; and Tulsa, Oklahoma. The rate from Ft. Worth to Centralia, in the Illinois oil fields, is 99 cents per 100 pounds, 45 cents higher than if the Official scale, column 35, which

Parkersburg uses, is applied. On an average car of 40,000 pounds, there is a difference of $180.00 per car. From Tulsa to New Iberia, Louisiana, the rate is 47 cents per 100 pounds higher than the Official scale rate. The rate from Parkersburg to New Iberia is $1.19; if the Official scale were applicable, the rate would be 69 cents per 100 pounds (R. 2797; Ex. 102, R. 8610–11, 2802).

A Kansas manufacturer of coal preparation plants and washeries must absorb in competitive bidding the differentials in class rate levels which favor the manufacturers in Official Territory (R. 2931–36). On the Official basis the rates are 40 per cent of first-class, whereas from Kansas to Official Territory the charges actually paid are 45 per cent of a much higher interterritorial first-class rate scale. Solely because of this rate inequality, this company is considering moving its plant to Cincinnati, Ohio, where possible sites for a new location have been offered, in order to get the lower Official rates.

This Kansas company is now shipping to coal operators in Indiana, Kentucky, West Virginia, Ohio, and Pennsylvania, but has experienced great difficulty in meeting competition from Official Territory because of the higher freight rates. It has had to forego business in Pittsburgh, Pennsylvania, because of the rates (R. 2933), and has lost business to Link Belt of Chicago for the same reason (R. 2937).

A Minnesota traffic expert (R. 3120–40) testified that the Twin Cities need an adjustment of rates that will remove their present disadvantage in competing with industry in the more favored Official Territory. Since 1920, Minnesota and the Twin Cities have lost industry to Official Territory almost continuously. Specifically, the shifting of industry has been to Chicago, Freeport, and Peoria, Illinois, and to Ohio and Indiana, because of the disadvantage in freight rates affecting the industries of Minneapolis. Particular reference was made to the loss of the Caterpillar Tractor Company to Peoria, Illinois, because of unfavorable freight rates (R. 3126–7).

For many years Minneapolis and contiguous territory had a reasonable parity of rates with Official Territory and therefore enjoyed a reasonable industrial development. Now Minneapolis must ship its products under higher interterritorial class rates to Official Territory, in competition with Official Territory industry having an advantage under a lower level of class rates. Although the Official Classification governs between the Twin Cities and Eastern Territory, the first-class rate from Minneapolis to Chicago for 400 miles is $1.47, compared with a first-class rate of $1.15 for equal distances from competitive territory east of Chicago (R. 3126).

The interterritorial class rate structure available to the Minneapolis jobber or manufacturer importing from Official Territory is such that it does not permit the easy inbound movement of supplies and raw materials, in addition to the fact that outbound class rates handicap the movement of high-grade and diversified manufactures from the Twin Cities to Official Territory.

According to an Iowa traffic expert (R. 3032–51), the level of class rates between Official Territory and Iowa does not permit Iowa industries to purchase interterritorially, for the same cost, the miles of transportation their competitors across the river can buy within Official Territory. The present first-class rate between Waterloo or Cedar Falls and Indianapolis, Indiana, is $1.33 for the 415 miles. In Official Territory, this $1.33 will buy 580 miles of transportation, equivalent to the distance from Indianapolis, Indiana, to Omaha, Nebraska. This illustrates the severe rate handicap faced by shippers located adjacent to Official Territory (R. 3034).

A Wichita, Kansas, manufacturer (R. 3235–43; Ex. 142, R. 9754–8, 3241) of heating appliances which move on class rates, including large and heavy heating units like furnaces, competes with manufacturers in Ohio, Illinois, Kentucky, Pennsylvania, New York and Michigan. Between 1930 and 1941 some 442 cars of his products were moved into Official Territory under applicable class rates. This Kansas manufacturer, shipping gas or gasoline stoves to Chicago in carloads having a minimum weight of 16,000 pounds, pays $1.10 per 100 pounds as compared with the Pittsburgh producer's rate on similar shipments of 59 cents. He is also at a disadvantage in shipping house heating furnaces to Chicago. His rate is 75 cents per 100 pounds, while the Pittsburgh shipper enjoys a rate of 41 cents. Chicago is 454 miles from Pittsburgh, and 579 miles from Wichita.

Another Iowa traffic expert offered statistics on manufacturing, retailing, wholesaling, agriculture, and other business in Iowa, and testified that such business cannot confine itself to Iowa, and to states west of the Mississippi River, and prosper (R. 3018). He further testified that Iowa is so similar to Illinois that the Illinois Freight Association tariffs fix the rates which apply from eastern Iowa cities like Dubuque, considered as Illinois Territory, through Iowa following the Wabash Railway down to St. Louis. In other words, part of eastern Iowa is considered proper for operating purposes at the Illinois Freight Association rate level. As an example, from Dubuque to St. Louis, 318.4 miles, short line, the first-class rate is 98 cents, but from Cedar Rapids to St. Louis, 290 miles, almost paralleling the other service, first-class is $1.09, so that Cedar Rapids is penalized 11 cents per hundred pounds for being 28 miles closer than Dubuque to St. Louis. This is due entirely to the arbitrary territorial line set up at the Mississippi River. It has no foundation in rate making, from the witness' more than 30 years' experience (R. 3019). Official Territory shippers may buy 320 miles of transportation for $1.00 and 300 miles of transportation for 96 cents—much greater mileage than the 219 miles between Cedar Rapids and Chicago, which also cost 96 cents. Whereas the 362 miles from Cedar Rapids to Indianapolis cost $1.23, the Official Territory shipper may purchase 500 miles of transportation for $1.23. Specific competitive disadvantages of a power shovel manufacturer in Cedar Rapids, with a Milwaukee manufacturer, were described. The following table from Exhibit 121 (R. 9210, 3025), rounds out the Iowa picture:

Per cent interterritorial first class rates, Iowa points to Official Territory, exceed Official first class rates

From—	To—				
	Chicago	Evansville	Indianapolis	Detroit	Pittsburgh
Cedar Rapids	14.2	11.7	11.3	10.6	11.0
Ottumwa	14.1	12.7	12.2	10.9	7.9
Waterloo	18.4	15.9	19.8	12.5	12.9
Des Moines	18.4	21.8	21.4	18.5	17.1
Mason City	19.8	21.1	22.1	19.6	16.5
Fort Dodge	20.7	22.6	23.3	18.4	18.4
Council Bluffs	25.4	26.5	25.0	22.2	18.9
Sioux City	25.8	25.8	26.5	22.6	18.9

A rate expert of the Kansas State Corporation Commission described the application of the class rates to numerous Kansas minerals and derivative products (R. 2918–20). The witness compared the class rates on the Western Trunk-Line Territory Zone II and Zone III bases, with the

Official rate scale, using the average of all mileage blocks up to 1500 miles (Ex. 112, R. 8834, 2920). As an example, on porcelainware the average Zone II applicable class rate is 157 per cent of the Official Territory average, and Zone III is 172 per cent (R. 8836). Magnesium chloride, rated sixth class in Official and fifth class in Western, averages 199 per cent of the Eastern rate in Zone II, and 219 per cent of the Eastern rate in Zone III (R. 8837). Numerous other examples are shown in this exhibit, reflecting the wide disparities in class rate levels, and inequalities in ratings, as between Official and Western Trunk-Line territories.

A transportation and industry expert from the University of Texas analyzed the economic effects of freight rates on five concerns in Texas, using their paid freight bills (R. 2811–29), and his Exhibit 104 (R. 8629–42, 2820), contains convincing data showing numerous rate inequalities that inhibit Southwestern industries.

The freight bills on the shipments made by and to the industries in the Southwest, compared with what the rates would have been, inbound and outbound, on the same articles for similar distances within Official Territory, showed that the freight payments of these five concerns exceeded by $83,054.62 the amount that would have been paid had all inbound and outbound shipments been charged on the Official basis for equivalent service.

The Sche-Rose Manufacturing Company of Dallas, producers of bread-making compound, for the year 1941 paid approximately 63 per cent more in freight charges than it would have paid had the Official level of rates been applied. A shipment from Dallas to Philadelphia, for example, moved at a class rate of $1.93 per 100 pounds, when the Official level would have only been $1.33. The economic disadvantage suffered by this concern for 1941 on the basis of freight charges represented 57.7 per cent of its manufacturing wages, over 6 per cent of its capital stock, 5.9 per cent of net sales, and over 23 per cent of office and administrative salaries. The customers, workers, or stockholders could have enjoyed the savings to be realized in freight charges had the goods moved on the Official rate level (Ex. 104, R. 8634, 2820; 2817).

The freight charges on shipments made by the Walker's Austex Chili Company, Austin, Texas, during 1941 were over $14,000 more than would have been charged for equivalent service under the rates in effect in Official Territory. The economic disadvantages of freight charges for this company when compared with Official amounted to 7.31 per cent of its capital stock, 3.29 per cent of cost of goods sold, and 2.12 per cent of net sales (Ex. 104, R. 8630–1, 2820; 2816).

The Superior Products Company, Dallas, manufactures toilet preparations, perfumes, and related articles. Its actual inbound freight charges for the year 1941 amounted to $65,317.39. The charges for equivalent service under the Official level of rates would have been only $37,828.22. The total freight charges amounted to over 29 per cent of the cost of the goods sold, 18.29 per cent of net sales, 59.74 per cent of capital invested, and over 300 per cent of wages paid.

To illustrate the drastic differences between the rates that are charged this producer on the present levels, as against the rates under the Official basis, one actual shipment consisted of 51,495 pounds of drugs moving from Petrolia, Pennsylvania, to Dallas at a class rate of $1.14 per 100 pounds. The total charge collected was $5,870.49. Under the Official level for equivalent service, the same shipment would have moved at a class rate of 75 cents per 100 pounds and the charge would have been only $3,862.16 (Ex. 104, R. 8633, 2820).

A similar case history is revealed by an examination of freight charges paid by the Brenham Cotton Mills, Brenham, Texas. For example, it cost this concern $3.53 per 100 pounds in freight charges to ship textile machinery from Biddeford, Maine, to Brenham. During 1941, numerous shipments were received from Biddeford that moved on this class rate, whereas a rate of $2.48 is applicable on the same articles within Official Territory for equivalent service (Ex. 104, R. 8632, 2820).

E. L. Hart, Traffic Manager of the Atlanta Freight Bureau, testified in part, as follows (R. 4752):

> The next item appearing is calendars. We have in Atlanta some very large printers. We try to get some business in Official Territory. We do get some business some times and at the present time are doing a great deal of work for the Government, but of course that is not ordinary work, but with respect to the calendar situation we have one printer in Atlanta, and a rather large operation, and he endeavored to get into this business and did secure at one time some business in the North and I think the calendars made in Atlanta are just about as good—Now this Gulf Refining calendar, that business was secured one year and was later lost because of our inability to secure proper rates out of Atlanta, carload—they all move in carload quantities.
>
> The business of the International Agricultural Corporation was also lost for the same reason and you will find the 1940 contract of the Atlantic Coast Line Railroad, one of our main Southern railroads, was given to this concern but he hasn't had it since that date, although he is located on the Georgia Railroad, a child of the ACL, and the ACL today is buying their calendars in Chicago.
>
> When this Gulf Refining Company contract came up on April 9, 1941, I made a

very strenuous effort to have the Southern carriers do something about these rates into Official Territory.

I finally reached an agreement with the Southern lines as to certain rates to be published to Boston, New York, Philadelphia, Pittsburgh, Toledo, Louisville, and the proposal was filed under date of July 7, covered by submittal No. 26056, suggesting those particular rates which were not entirely satisfactory and were not on a destination level by any means, but nevertheless we felt might permit this manufacturer to continue being favored with this business.

That problem met the usual fate of all interterritorial problems that come from the little man. It was nonconcurred in very promptly by the Official Territory lines, and my file is closed. No rates were ever published. Consequently the calendar manufacturer in Atlanta is not in the calendar business any more, although he prints just as good a calendar as our very good friends.

* * * * *

(R. 4754):

The next item is machinery wiping rags. That is a manufactured product. It is produced in rather large quantities in Atlanta and at certain other points in Southern Territory and at particular points in Official Territory.

The carload basis within the South and from the South to the North is 180 per cent of the Official Territory level.

We were not very much concerned about the carload rates on these articles until there began a demand under the present emergency for the purchase of these rags in carload quantities.

The l. c. l. basis is the same as the rates on textiles, and it took about three years to have this particular adjustment made on these rags in the South and inter-territorially, but in any event they do not apply on carloads. Therefore, our l. c. l. rates into the North are very near the northern level so we haven't complained so much about the l. c. l. rates, but when this carload business came into the offing then we were very much embarrassed.

I have here, Mr. Commissioner, a number of bids of the United States Government which these people have bid on at Sewell's Point, Norfolk, Virginia, and Mechanicsburg, Pennsylvania, and Bayonne, New Jersey, and these bids have all gone to the northern manufacturers except that last one, and that comes about by the establishment of a rate from Atlanta to Norfolk at our insistence that would put this man in competition with the northern producing points.

That matter was first handled with the Southern Railway on October 7, 1942. The rates became effective on [R. 4755] March 2, 1943. There was fairly prompt handling of that situation at Norfolk. Of course, we agreed there was no hopes of getting the Trunk Lines to concur in rates to

Mechanicsburg and Bayonne, and we did not file a proposal to cover those rates.

The Southern Railway, however, was not willing to meet the northern level precisely at Norfolk. They were willing of course to establish a rate of 46 cents. That rate represented a rate 5 cents higher than if the Northern or Official Territory basis were applied.

I was forced to accept the rate although I felt that the Southern lines should establish the northern level which would have given Atlanta a rate of 41 cents.

After that rate was under consideration, and the assurance that it would be established by the Southern lines, this Atlanta producer was able to secure a contract from the Government covered by Negotiation No. 2698 dated January 15, 1943, distributed by the Navy Department for delivery of 690,000 pounds within a certain period at the Navy Yard at Norfolk, Virginia.

That business was secured by these people on a delivered basis of 10.35 (cents) per pound whereas their competitor at Hamilton, Ohio, who had been securing this business heretofore, bid 10.87 (cents) so you can see how close those two bids were and what the difference in rates means when you understand that the prior rate from Atlanta to Norfolk was 75 cents and from Hamilton, Ohio, 42 cents. That shows that the competitive situation is controlling in many instances with respect to a commodity of this character.

> I don't think it is necessary to read these bids that have been offered but they run into the millions of pounds of these rags, and it is valuable business, but there is no chance for the Atlanta manufacturer to secure any of that business.

A Tennessee public official, a rate expert (R. 2601–12), explained "why it is that Nashville cannot sell work clothing in the North and East, as her rates mile for mile are approximately 31.5 percent higher than her competitors' in Central Territory" (R. 2607; Ex. 91, R. 8330, 2608). The following rate comparisons were shown:

Comparison of rates in cents per 100 pounds, cotton work clothing, less-carload from Nashville, Tennessee, and from points in Official Territory to points in Official Territory

Origin	Destination	Miles	Rates
Nashville, Tenn	Chicago, Ill	443	106
Pittsburgh, Pa	Chicago, Ill	460	82
Nashville, Tenn	Buffalo, N. Y	725	137
Alton, Ill	Buffalo, N. Y	712	103
Nashville, Tenn	Boston, Mass	1178	176
Alton, Ill	Boston, Mass	1206	135
Nashville, Tenn	Detroit, Mich	545	120
Allentown, Pa	Detroit, Mich	585	91
Nashville, Tenn	Cleveland, Ohio	549	118
New York, N. Y	Cleveland, Ohio	556	90
Nashville, Tenn	Grand Rapids, Mich	537	120
New York, N. Y	Grand Rapids, Mich	779	108
Nashville, Tenn	Indianapolis, Ind	297	96
Buffalo, N. Y	Indianapolis, Ind	408	82

The Sweet Potato Growers, Inc., with a starch plant at Laurel, Mississippi, for the seven months ending February 28, 1941, paid freight charges which amounted to 21.8 per cent more in dollars paid than the Official Territory level for comparable movements. On carload shipments the excess of actual charges over the Official basis was 15.6 per cent and on less-carload shipments the excess amounted to 44.6 per cent (Ex. 76, R. 7981, 2393). This excess of actual charges was 2 per cent of the total net sales. If this difference in rates paid had been available to the Sweet Potato Growers, Inc., the corporation could have paid either 8 per cent more for raw materials, 10 per cent more in wages, or 124 per cent more in net profits (R. 2386).

A North Carolina washboard manufacturer's greatest competition is from Michigan and Ohio companies. Lower competitive interterritorial rates have been withheld from his company by the railroads, and therefore in bidding on a delivered-price basis against competition in Official Territory, he must absorb the higher freight charges from Raleigh (R. 2469–73).

The less-carload class rates paid on actual shipments from Raleigh, compared below with the rates available within Official Territory to competitors for equal service, are representative of the disadvantage of the Southern Territory shipper (Ex. 79, R. 8015–6, 2472):

To—	Mileage	Class rates in cents per 100 pounds	
		Paid by Raleigh shipper	Official basis
Charleston, West Virginia	403	90	78
Chicago, Illinois	[illegible]	132	118
Detroit, Michigan	760	124	109
Portland, Maine	831	126	116
Scranton, Pennsylvania	533	101	90
Toledo, Ohio	704	117	106
Wilkes-Barre, Pennsylvania	515	98	87

Shown below (Ex. 220, R. 11696, 4765) is a list of manufactured articles produced in Atlanta, Georgia, that have markets in Official Territory. These articles move on class rates in both Southern and Official Territories, and the disadvantage of the Georgia producer as compared with the Official producer is shown for each commodity in the last column:

Commodity (carloads, unless otherwise shown)	Classification ratings stated as percentages of first class			Percent Southern rate level is of Official
	Southern	Official	South to Official	
Calendars, paper	55	55	55	138
Electrical appliances: Switchboxes, outlet plates, conduit outlet boxes, with or without fittings.	LCL 70 CL 45	70 40	70 45	138 156
Cloths or rags, wiping	40	30	40	180
Tanks, iron or steel, thinner than No. 2 gauge but not thinner than No. 16 gauge	55	55	55	138
Lead products:				
Sheet	30	35	35	138
Pipe and fittings	40	35	40	160
Wine (in tank cars)	55	55	55	138

The Commissioner of the Memphis, Tennessee, Freight Bureau testified as to the movement of macaroni, noodles, and spaghetti from Memphis, and comparative rates (R. 2335–56). The Memphis manufacturer distributes his goods throughout Southern Territory, but with the exception of border points, has been unable to market his goods in Official Territory in competition with manufacturers at Chicago and St. Louis, because shippers there enjoy rates relatively lower than those applicable from Memphis. He testified that the movement both in Southern and Official Territories was on class rates (R. 2336).

The rate on macaroni, spaghetti, and noodles, less-carload, from Memphis to Hamilton, Ohio (512 miles) is 82 cents per 100 pounds; the rate from St. Louis, Missouri, to Cleveland, Ohio (522 miles), is 62 cents per 100 pounds (Ex. 75, R. 2356 uu, 2341).

Taking Evansville, Indiana, as a representative border point destination, the rate from Memphis (301 miles) is 70 cents per 100 pounds. From Chicago (284 miles) the rate is 48 cents per 100 pounds. This 22-cent advantage was typical.

The rate from Memphis to Metropolis, Illinois, is 53 cents per 100 pounds for the haul of 179 miles, while the Chicago producer, for the haul of 355 miles, nearly twice as far, enjoys a rate of 52 cents (R. 2356 vv).

An official of a tanning company in Andrews, North Carolina, which ships leather products to the North, testified (R. 2455–61) that he had "experienced considerable difficulty in selling and quoting prices in line with prices quoted from tanneries who are in position to ship at lower freight rates" (R. 2457).

The significance of certain inbound class rate discrimination affecting this tannery is illustrated by specific inbound shipments which cost this company 25.7 per cent more in freight charges than would have accrued had they moved under Official Territory rates. The economic disadvantage here, arising out of payments on inbound consignments of dry hides, is emphasized when the applicable fourth-class rates to the following actual shipments (Ex. 77, R. 8[illegible]3, 2459) are compared with rates for equidistant hauls in Official Territory:

Illustrative shipments, dry hides, carload minimum 20,000 pounds.

From	Date	Car No.	Class rate formula miles	Class Rates		Revenue Differential (dollars)
				As applied	Official basis	
New York, N. Y.	6-10-42	PRR 78032	812	122	84	205.58
New York, N. Y.	6-10-42	PRR 80632	812	122	84	207.96
Waverly, N. J.	6-10-42	PRR 56782	812	122	84	154.08
New York, N. Y.	6-16-42	N-W 46790	812	122	84	156.84

A manufacturer of automobile truck bodies at Nashville, Tennessee (R. 4614–53) labors under a rate handicap as high as 253 per cent of the rates available to his competitor at Detroit, Michigan, in the sale of truck bodies at Metuchen, New Jersey (R. 4635). In this case the Nashville rate was the Southern Classification rating of second class—$2.10 per 100 pounds. The Detroit shipper enjoyed rates ranging from 53 cents to $1.03 per 100 pounds, depending upon the carload minimum weight. These rates represent Official Classification exceptions ratings applied to the Official level of rates (R. 4634). Metuchen is 965 miles from Nashville, and 616 miles from Detroit.

On palmetto fibre, used in the manufacture of brushes, the applicable class rates and certain basic scale rates from Jacksonville, Otter Creek, and Benson Junction, Florida, to representative Official Territory cities, are compared with the applicable import class rates from New York to the same localities (R. 2651). The following tabulation (Ex. 92, R. 8440–1, 2654) indicates, among other disparities, that a competing manufacturer in St. Louis, 1027 miles from New York, can get imported fibre from New York on a rate of $1.21, that is, 71 cents less than the rate on Florida fibre from Benson Junction, Florida, to St. Louis, for a comparable equidistant haul of

1029 miles. The Florida producer has a rate disadvantage of 58½ per cent (R. 2651):

Palm or palmetto brush fibre, less-carloads

[In cents per hundred pounds]

To— (A) Chicago, Ill. (B) St. Louis, Mo. From—	Mileage		Rates applicable (3d class)	Southern basic scale K-2 (3d class)	Official Territory basis	Amount and percentage difference, applicable rate over Official Territory basis	
						Amount	Percentage
Jacksonville, Fla	(A)	1,061	184	181	133	51	38
	(B)	915	172	167	172	50	41
Otter Creek, Fla	(A)	1,037	198	183	135	63	47
	(B)	933	181	169	123	58	46
Benson Junction, Fla	(A)	1,173	207	190	141	66	47
	(B)	1,029	192	178	131	61	47
New York, N. Y	(A)	890	[1] 111		120		
	(B)	1,027	[1] 121		131		

[1] Import class rates.

Of this testimony, another witness (R. 2706–30), who made studies of the manufacture and distribution of palmetto fibre at these Florida points, testified as follows (R. 2718):

> The differences in the rates, and the particularly low rates on imported fibres actually encourage the importation of fibres produced under low wage conditions. Inducement is given to import fibres rather than to use the only domestically produced vegetable brush fiber, Florida palmetto. The domestic fibre, Florida palmetto, suffers the disability of much higher freight rates and its production and usage is thereby curtailed.

The following tabulation (Ex. 92, R. 8442–3, 2654) indicates, for example, that fibre brushes manufactured in Florida must overcome a rate handicap of 48½ per cent in competition with the New York to St. Louis rate of 157 cents:

Fibre brushes, less carload

[In cents per hundred pounds]

To— (A) Chicago, Ill. (B) St. Louis, Mo. From—	Mileage		Rates applicable (3d class)	Southern basic scale K-2 (3d class)	Official Territory Basis	Amount and percentage difference, applicable rate over Official Territory basis	
						Amount	Percentage
Jacksonville, Fla.	(A)	1061	224	220	162	62	38
	(B)	915	208	203	148	60	40
Otter Creek, Fla.	(A)	1087	241	223	164	77	47
	(B)	[illegible]	220	208	150	70	46
Benson Junction, Fla.	(A)	1173	251	232	171	80	47
	(B)	1029	233	217	159	72	47
New York, N. Y.	(A)	890	[1] 142		145		
	(B)	1027	[1] 157		159		

[1] Import class rates.

Another witness had this to say about the Florida fibre brush figures:

> It is my opinion based upon my study of this industry that the existing freight rate structure is partly, at least, accountable for the fact that the manufacture of brushes from fiber has been in Official Classification Territory and that the manufacture of brushes in Florida near the sources of raw materials is of such relatively insignificant proportions. It is my opinion that if an equitable and uniform basis of rates, mile for mile, were established, the manufacture in Florida of brushes from Florida palmetto fiber could be expanded far beyond the present output * * * (R. 2719).

The following table was also taken from Exhibit 92 (R. 8448, 2654):

Cigars, any quantity

[In cents per hundred pounds]

To— (A) Chicago, Ill. (B) St. Louis, Mo. From—	Mileage	Rates applicable (2d class)	Southern basic scale K-2 (2d class)	Official Territory Basis	Amount and percentage difference, applicable rate over Official Territory basis	
					Amount	Percentage
Jacksonville, Fla.	(A) 1061	224	220	162	62	38
	(B) 915	208	203	148	60	40
Tampa, Fla.	(A) 1226	256	240	178	78	44
	(B) 1049	239	217	159	80	50
New York, N. Y.	(A) 890	[1] 142		145		
	(B) 1027	[1] 157		159		

[1] Import class rates.

The Tampa producer of cigars pays $2.39 per 100 pounds to move his product to St. Louis, a distance of 1,049 miles; a competitor located in New York pays $1.57 per 100 pounds to ship imported cigars to St. Louis, a distance of 1,027 miles.

Unsuccessful efforts to obtain reduced rates on matches in 1939 resulted in the abandonment and loss of a Jacksonville plant which had previously manufactured safety matches in cardboard strips for use as advertising matter, shipped in appreciable volume, both carloads and less-carloads. Exhibit 92 (R. 8394, 2654) shows the fifth-class rates on matches, in carloads, from Jacksonville to important cities in Official Territory, and the percentages by which the rates exceeded the Official class rate basis. Reference, in particular, is made to the applicable rate of 118 cents from Jacksonville to Chicago as being 176 per cent of the Official basis or fifth-class rate of 67 cents for equidistant hauls. "The high level of the class rates from Jacksonville into Central Territory was one of the primary causes of the discontinuance of the manufacture of safety matches in the Jacksonville plant" (R. 2654).

A witness from the Southwest introduced exhibits containing comparative rate statements showing that the class rates to and from that section are, mile for mile, on a higher level than those applicable within Official Territory (R. 2731–63). The following tabulation (Ex. 96, R. 8550, 2746) is representative of the glaring rate disparities under which Southwestern shippers must operate:

Shortline distance and rates, fibreboard boxes (knocked down), carloads, from Sand Springs, Oklahoma, to points shown, and rate for distance in Official Territory

Destination	Distance	Rate 5th class (37½%)	Official 27½ J. (6th class)
Chicago, Ill	688	0.78	0.41
Pittsburgh, Pa	1,043	.96	.51
Cleveland, Ohio	958	.92	.49
Indianapolis, Ind	672	.79	.40
Baltimore, Md	1,391	1.11	.62
Grand Rapids, Mich	863	.86	.46
St. Louis, Mo	431	.64	.31
Kansas City, Mo	251	.49	.25

Shortline distance and rates, fibreboard boxes (knocked down), carloads, from Dallas, Texas, to points shown, and rate for same distance in Official Territory

Destination	Distance	Rate 5th class (37½%)	Official 27½ J. (5th class)
Chicago, Ill	939	0.98	0.48
Pittsburgh, Pa	1,233	1.14	.57
Cleveland, Ohio	1,143	1.09	.54
Indianapolis, Ind	862	.97	.46
Baltimore, Md	1,433	1.28	.64
Grand Rapids, Mich	1,084	1.06	.52
St. Louis, Mo	605	.47	.39
Kansas City, Mo	484	.47	.34

An expert rate witnes representing 95 per cent of the southern furniture manufacturers testified (R. 4815–33) that the present adjustment of rates on furniture within and from the South dates back to 1932 and represents various kinds of rates, all published as percentages of first class. Since the revisions of 1932, the rates on furniture within and from the South, with a few minor exceptions, have been made with direct relationship to the first-class rates, and therefore the first-class rates are the basis for determining the southern rates on furniture (R. 4816).

In the fall of 1932 the Official lines published truck competitive ratings on furniture by exceptions to the classification. The southern carriers then sought approval of Official carriers in revising the rates from Southern Territory, to a percentage of the applicable first-class rates which would approximate the level in Official Territory so as to equalize the reduced rates in the latter territory. The Official carriers declined to equalize the rates, and countered with a suggestion, accepted reluctantly by the southern carriers, that resulted in rates higher than the existing commodity rates established by the southern carriers. Immediately there began an erosion of the furniture traffic from the South to Official Territory—from the rails to highway carriers (R. 4820–1).

In 1940 the southern furniture manufacturers and carriers made vigorous renewed efforts to correct the discrimination, but were unsuccessful. As the result of the refusal of Official Territory carriers to concur in the reduced rates from the South, the southern carriers lost seven or eight thousand cars of furniture per year. The witness concluded as follows (R. 4822):

> Because of that situation and because of the numerous efforts we have made from time to time to get the clearance of the Official lines in an equalized basis of rates, *we are convinced that it can be done only if required by this Commission, or if first class rates are prescribed on the same level in the two territories or between the two territories.* [Emphasis supplied.]

The Executive Director of the Arkansas Agricultural and Industrial Commission testified (R. 2776–81) that his job was to develop industry in Arkansas. He testified that "in practically every case one of our troubles has been the unequal freight rates," and that without equalized freight rates and uniform classification with Official Territory on manufactured articles, Arkansas was not going to get proper industrial development (R. 2777-8).

An executive of a large iron and steel company located at Pueblo, Colorado, testified (R. 2495-2506) that his company's present eastern distribution radius is 700 miles, whereas to the North, West, and South, its steel products move from 1,000 to 1,600 miles to important markets; that the controlling factor in preventing a larger distribution to eastern markets is the prejudicial effect of the present class rate structure (R. 2498), which requires the payment of higher freight charges for the same distances than shipments from eastern origins. "The class rate structure is equally responsible whether the steel moves at the full fifth-class rate or at 32½ percent of first class. As a matter of fact, the Colorado Fuel and Iron Corporation pays the full fifth-class rate from its mill at Pueblo, Colorado, on most of its shipments to an area in northwestern Oklahoma and Texas that is larger than the six New England States put together" (R. 2499). Pittsburgh can ship 50 per cent farther for the same charge than Pueblo, as illustrated by the applicable Class 45 rate from

Pittsburgh to Omaha, Nebraska, against the current Class A rate from Pueblo, Colorado, to the same destination, on an actual movement of shell body forgings. The present rate from Pueblo to Omaha, for a haul of 601 miles, is $1.05, whereas from Pittsburgh to Omaha, involving a haul of 922 miles, the rate is only 99 cents, a double penalty inasmuch as the rate, mile for mile in the East, is lower than in the West, while at the same time the article is rated higher, 40 per cent of first class in the East, against 45 per cent (Class A) in the West. As the western United States becomes industrialized, they will ship new commodities, and it is unfair for a western-located industry to wait until the problem arises, only to discover that variations in classification impose extra and unexpected handicaps (R. 2503).

Additional examples of class rate disparities favoring Official Territory over Southern Territory are set forth in exhibit 88 (R. 8162–71, 2578). The figures shown in the last column of the following table represent the percentage relationship of the actual rates under the Southern class rate scale to the actual rates under the Official class rate scale for any selected distance.

Commodities (carloads, unless otherwise shown)	Classification ratings stated as percentages of first class			Per cent Southern rate level is of Official
	Southern	Official	South to Official	
1. Acid, sulphuric (in containers)	30	30	35	120
2. Acid, sulphuric (in tank cars)	27½	27½	35	110
3. Aluminum articles	75	75	75	138
4. Aluminum articles, LCL	100	100	100	138
5. Aluminum Stearate N. O. I. B. N	40	40	35	160
6. Batteries, electric storage	40	40	40	138
7. Bottles, glass	35	35	35	138
8. Charcoal, wood	22½	27½	25	125
9. Cement, concrete, waterproofing compound	40	40	35	160
10. Drugs	45	45	50	122
11. Iron and steel articles structural, LCL	40	40	50	114
12. Lead products, sheet	35	35	35	138
13. Lead products, pipe and fittings	40	40	35	160
14. Paint (other than earth) dry	40	40	35	160
15. Pottery	35	35	35	138
16. Starch	30	30	27½	150
17. Softener, cotton	37½	37½	35	150
18. Tanks, iron or steel:				
No. 2 Gauge	40	40	40	138
No. 3 Gauge	55	55	60	130
19. Wine	55	55	55	138
20. Yarn, rayon	45	45	55	115

Appellants insist that too few shipper witnesses testified to give the Commission a sufficient picture of class rate inequalities on which could be based its findings. Appellants, apparently in an attempt to discredit the shipper testimony, have gone to the extent of quoting at length, not only in briefs but in the original petition in No. 343 (R. 12–16), from the Commission's report, in which the testimony of certain shipper witnesses is summarized.

It may be conceded that these summaries by the Commission are not always as complete or illuminating or helpful as they might be. Therefore, in this brief, the statements have been based on the record itself, and the illustrative material summarized above should certainly demonstrate beyond any doubt how discriminatory and unreasonable the class rate structures are, both in general levels and in particular situations.

The answer to appellants' contention that there were too few shipper witnesses is that class rates cover a great variety of miscellaneous articles of freight, and affect practically every community and every shipper and receiver of freight in the United States. There are tens of thousands of communities, and hundreds of thousands of shippers and receivers of class rate traffic. The class rate structure, therefore, must be made to accommodate the legitimate needs of all these varied interests, present and prospective, and must, of necessity, be carefully integrated and spread over the vast territory affected. As a practical proposition, all these thousands of communities and shippers could not have been heard in this case without extending the proceedings beyond all reasonable limits. Furthermore, to undertake to hear any given number of individuals, and their own peculiar transportation problems, would always create a serious risk that if these witnesses were not heard by some carefully evolved system of sampling—which, as a practical matter, it would be impossible to effectuate—the record would be distorted so that a fair and just decision to all interests involved would be impossible. There are other ways of obtaining the necessary information than the method of depending wholly on shipper testimony, and the Commission, as demonstrated by the record, although it did not refuse to hear some shipper witnesses, found and used those other ways, with conscientiousness and faithfulness to its task.

(B) *Higher class rates have impeded the development and movement of class rate traffic within Southern and Western Territories, and from these Territories to Official Territory, and thus have made all the class rate structures involved in this proceeding obsolete*

(1) Impeding the development of class rate traffic—economic data

In *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, this Court, in describing the considerations which should govern the Commission in inquiring into the unreasonable and discriminatory character of rates, stated that (162 U. S. 219):

> all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

The opening sentence of the Commission's findings and conclusions about class rates in this proceeding is as follows (R. 302-3):

> Appropriate to the breadth and variety of the interests involved in this proceeding, the record has not been narrowly restricted to rate comparisons and the competitive and other effects of rates upon particular industries or individual shippers, but has been developed within a sufficiently broad perspective to permit us to consider all the essential circumstances and conditions which affect the welfare of carriers, of producers, shippers, and consumers, and of localities, districts, regions, and territories.

The relevance of the economic data considered by the Commission stems, therefore, from precedent as well as logic. We agree with appellants that a rate inequality without a showing of injury does not demand correction. With territorial rate inequalities demonstrated, proof of territorial disadvantages is necessarily relevant. The extent of the causal connection may not be susceptible of exact determination, but the existence of a causal connection was certainly a legitimate inference for the Commission. (R. 310, 311, 313.)

The Commission considered in its investigation evidence pertaining to the raw materials and economic development of each freight rate territory. Basic Government statistics on natural resources, manufacturing, labor, income, and population were considered in making comparisons and analyses.

Official Territory has a vastly greater share of manufacturing than the other territories, particularly with respect to consumer goods. The following table shows the relationship between the five rate territories in terms of land, workers, and manufacturing.

Land area, gainful workers, value of manufactured products, and value added by manufacture, by freight rate territories as a per cent of the United States total

Territory	Land area, 1940	Gainful workers, 1930	Value of manufactured products, 1939	Value added by manufacture, 1939
Official	13.5	51.1	67.8	71.4
Southern	13.3	16.8	10.0	9.4
Western Trunk Line	20.9	13.5	9.9	8.7
Southwestern	14.2	9.3	4.5	3.3
Mountain Pacific	38.1	9.3	7.8	7.2
Total	100.0	100.0	100.0	100.0

Source: Ex. 1, R. 5016A, 1546, Ex. 9, R. 5631, 5640, 5643, 1728.

This table reveals that Official Territory has five times as much of the value added by manufacture as compared to Official's share of the land area; in contrast to this, Southern has 13.3% of the land area and only 9.4% of the value added by manufacture. Of particular significance is the fact that in 1939 Official had 67.8% of all the manufactured products in the United States, by value, and 71.4% of the total value added by manufacture.

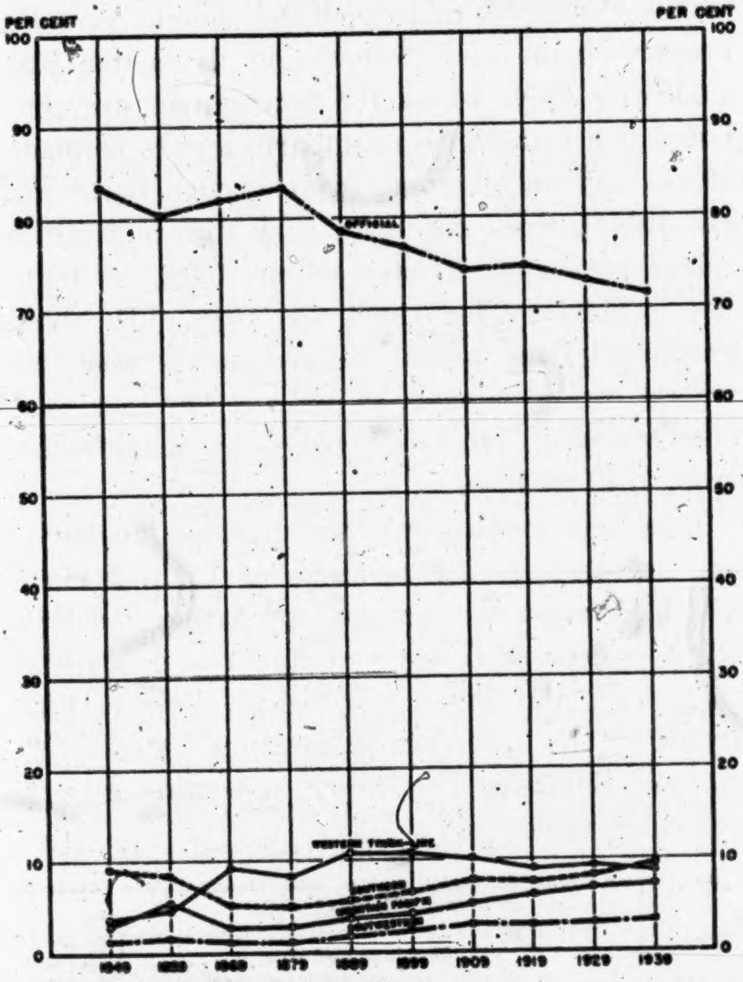
The next table below gives the figures on the industrial growth of each freight rate territory as measured by gainful workers and manufacturing. It should be noted that this actual increase in the value added by manufacture was seven times as much for Official Territory as it was for Southern, whereas the increase in the value of manufactured products was only five times as much for Official as it was for Southern. Simple percentages of increase, based on the widely different starting figures, do not indicate this important consideration. Thus, while Official Territory's increase in its value added by manufacture was 48% of the increase in its value of all manufactured products, Southern Territory only made a comparable showing of 39%, and Western Trunk-Line of 41%.

Actual increases in gainful workers, total value of manufactured products, and total value added by manufacture by freight rate territories.

Territory	Actual increase in total gainful workers from 1910 to 1930	Actual increase in value of products in all manufacturing industries from 1909 to 1939	Actual increase in value added by manufacture in all manufacturing industries from 1909 to 1939
Official	6, 230, 273	$23, 561, 190, 000	$11, 284, 350, 000
Southern	652, 755	4, 229, 396, 000	1, 662, 336, 000
Western Trunk-Line	904, 966	3, 117, 079, 000	1, 284, 706, 000
Southwestern	1, 011, 151	1, 942, 378, 000	560, 288, 000
Mountain Pacific	1, 863, 419	3, 320, 930, 000	1, 341, 785, 000

Source: Ex. 9, R, 5631, 5640, 5643, 1728.

VALUE ADDED BY MANUFACTURE FOR ALL MANUFACTURING INDUSTRIES—PERCENTAGE DISTRIBUTION BY FREIGHT RATE TERRITORIES, 1849 TO 1939



Source: Ex. 9, R. 5643, 1728.

The rate of growth in manufacturing in the South has been greater than in Official Territory for recent years. This was to be expected in spite of unequal freight rates, because of the disproportionate original balance between the two territories and the advantages of the South in natural resources. In measuring this growth, however, trends expressed in percentages should give the proper weight to differences in the actual base quantities from which the percentages are computed if a fair relative comparison is to be made. Horse and rabbit stew, made of one horse and one rabbit, does not taste very different if the rabbit ingredient is stepped up 100% by using two rabbits. The chart on page 131 shows graphically the actual differences between the freight rate territories, as measured by each one's percentage of all value added by manufacture from 1849 to 1939.

Economic conditions in the different territories are reflected in the earnings of their workers, which govern their standard of living, and their effective demand to buy manufactured goods from their own and other territories. This is illustrated by the difference in earnings between Official and Southern Territories, as contained in the following table:

Total income payments, dollar income, and relative income levels per person employed, 1940

Territory	Total income payments		Average dollar income per person employed	Relative income level per person employed
	Millions of dollars	Per cent of total		
Official	$49,005	64.3	$1,988	118
Southern	6,648	8.7	940	56
Southwestern	4,889	6.4	1,177	70
Western Trunk-Line	6,863	9.0	1,411	84
Mountain Pacific	8,854	11.6	1,997	118

Source: Ex. 76, R. 7972-3, 2393.

It is significant that the average dollar income per person employed in Official Territory is more than twice as much as in Southern Territory, which is 44% below the national average as given in this table; Official is 18% higher. The principal reason for this is the greater volume of manufacturing in Official Territory, particularly in the upper stages of manufacturing. Primary manufactured goods, such as cotton cloth and heavy chemicals, are made in the South and shipped to Official Territory to make finished products, some of which are shipped back to the South. In these later stages of manufacturing, higher wages and profits are usually realized (R. 2367, 2614).

Unfortunately, manufacturers distributing their products on a regional or national scale do not price them in a particular state according to the average income per worker in that state. A manufacturer of canned goods, tools, shoes, farm implements, rubber nipples, or patent medicines will set his price for the country as a whole, and the difference in the price the consumer must pay is the difference in freight. Frequently differences in freight rates are at the expense of labor and profits.

Official Territory has less than 4% of the available iron ore reserves of the United States, and no reserves of metallic copper (Ex. 1, R. 4935-6, 1546). In sharp contrast to this, the manufacture of steel and copper products is highly concentrated in Official. In the South, where 53% of the iron ore reserves are located, there is an abundant supply of soft coal readily accessible (Ex. 1, R. 4935, 4992c). Another measure of this territorial specialization is the fact that Official Territory has 69% of all workers engaged in manufacturing in the United States, compared to only 29% of all workers in all extractive industries (Ex. 76, R. 7967, 2393).

The South and West furnish the raw materials to Official Territory, which adds intensively to their values by making the finished products. Consequently the South and West depend on northern manufacturers not only as a market for their raw materials, but also as a supplier of the finished products they need.

Expert witnesses told the Commission that further economic progress in the South and West is largely dependent on industrial development and greater diversification, and that, at present, the people have little alternative to earn a living except in agriculture or raw material production, both of which are at or near the saturation point in the South and West (R. 2379, 2947, 3089–90). The high dependence on agriculture and production of raw materials in the South and West, and the relatively low income in these regions, go hand in hand and are directly related. Specialization of the South and West in these pursuits subjects the people of this area to economic deficiencies and dislocations. By establishing industries in the South and West, economic wastes could be avoided, one of which is caused by excessive congestion in the great urban industrial communities of Official Territory, far from most of the raw materials sources.

One of the ways in which the present disparities in class rate levels discourage industrial expansion in the South and West is by forcing producers in such rate-handicapped locations to absorb higher freight charges resulting from rate inequalities. Many of the producers of manufactured products in the South and West feel the impact of this burden through reduced profits and narrower markets.

The differences and the effect of unequal class rates are strikingly illustrated by figures on value added by manufacture in the interterritorial traffic balances, which contribute so heavily to national income, and especially to the income of Official Territory. Thus the average ton of outbound freight from Official Territory represents value added by manufacture of $54.69, which is about thirteen times as great as the $4.19 value added by manufacture to the average ton outbound from the South and West (R. 2366).

Industrial expansion of the type most needed in the South and West, that is, of those industries engaged in processing in the later stages of production, is the most seriously affected by the present class rate system. In a study of shipments from Southern Territory to Official Territory, the rates on clay were 12% higher than the Official Territory rates for equal distances, while in the case of the more highly processed products of pottery and chinaware, the rate was 40% higher than the Official Territory rate for equal distances (Ex. 76, R. 7975, 2393).

The spread between raw material rates and manufactured goods rates moving from the South and West to Official Territory is further illustrated by cottonseed oil, a basic agricultural commodity on which the rates are 7% higher from Southern to Official Territory than they are within Official Territory. If the cottonseed oil is manufactured into oleomargarine, the rates from Southern to Official Territory become 35% higher than the rates within Official Territory (Ex. 76, R. 7975, 2393).

By this means, industries which intensively fabricate and process goods, and thereby add greatly to their values, are prevented from being established in such rate-handicapped territories. As a result of this condition, the relative income per capita for the inhabitants of these territories is the lowest in the country, and this in turn tends to perpetuate the high dependence on income from raw materials in the South and West.

The South and West are also dependent on Official Territory for markets for new manufacturing industries, because a substantial portion of the purchasing power is in Official Territory, which has over 49% of the population of the United States (Ex. 9, R. 5628, 1728), 76% of the national market for industrial machinery and raw materials, 64% for all goods and services, 62% for consumer luxuries, and 53% for consumer necessities (Ex. 76, R. 7979, 2393).

As was shown in the tables above, Official Territory has a substantially greater share of industrial production, and, with respect to volume, Official Territory has increased many times more than any other territory. It is true that the South and West have increased in terms of simple percentages, at a greater rate during the last 30 years, but not by weighted percentages of increase, and not in the dollars that count. For all practical purposes the relative position of the different territories with regard to manufacturing has not changed. It should also be pointed out that the South has developed some new industries such as cotton textiles, which were located in the South in spite of rate differences, and largely owing to lower wage rates. Some other industries have located in the South in spite of the difference in rates. It is impossible to measure quantitatively the effect of different freight rates on the location of industry any more than it is possible to tell how many years longer a person would live if he had the optimum amount of fresh air and sunshine. Obviously, freight rates are one important factor.

Although only a few of all the war industries built with government financing are in the South and West as compared with the North, there are a sufficient number to make it all—important that they continue in peacetime operation, and unless a rate pattern is established which will afford the war plants an opportunity to survive in peacetime, there will be little hope for these plants to operate on civilian production (R. 2434).

Piecemeal adjustment of class rates will not adequately meet this problem, as the evidence before the Commission indicates (R. 2387). A comprehensive readjustment is needed, not only for the reasons detailed elsewhere in this brief, but also because individual adjustments do not and cannot consider traffic which does not already exist. The class rates discriminate against the industries that use and pay them; they also discriminate against the industries in existence which would use them if they were not so high; but they go even further, and discriminate against industries still unborn and which cannot be born until fair class rates precede them into existence.

(2) Non-use of class rates

It has now been demonstrated that the territorial class rates are unequal, and that the inequalities have caused injury to individual shippers and to territories as a whole, and thus require revision. There is, however, another independent and perhaps more fundamental reason for class rate revision. As the Commission found, the class rates have, from the standpoint of non-use, become obsolete, and "do not now serve the purposes for which they were designed." (R. 314).

In *Southern Class Rate Investigation*, 100 I. C. C. 513, 603 (1925) the Commission said:

> The new class rates should look also to the future. They should, for example, be so framed as to facilitate the elimination not only of special classification exceptions but also of many commodity rates which provoke complaints of discrimination and have no other excuse than an inadequate and imperfect class-rate structure.

Later, in *Consolidated Southwestern Cases*, 123 I. C. C. 203, 234 (1927) the Commission said:

> We are persuaded that the interests neither of the public nor of the carriers are served by maintaining carload class rates on such high bases that they are rarely used, making it necessary to follow the practice which has prevailed for many years in the Southwest of establishing commodity rates on practically all commodities which move in carloads in material volume.

The class rates, however, move a relatively small amount of the freight. The waybill study and tabulation made of carload traffic moving on September 23, 1942, shown in the following table, make this obvious (Ex. 228, R. 11834–5, 4903).

Territories (within, or from one to another)	Class rates	Exception rates	Commodity rates
	Per cent	*Per cent*	*Per cent*
Official	5.8	17.6	76.7
Southern	1.8	6.0	92.2
Western trunk-line	.6	.2	99.2
Southwestern	2.4	4.4	93.2
Official to southern	12.6	36.3	51.1
Southern to official	.9	4.9	94.2
Official to western trunk-line	12.3	35.4	52.3
Western trunk-line to official	3.1	1.0	95.1
Official to southwestern	22.5	52.0	25.5
Southwestern to official	1.5	3.4	95.9
Southern to western trunk-line	1.5	13.5	85.0
Western trunk-line to southern	6.1	3.1	90.8
Southern to southwestern	6.1	22.1	71.8
Southwestern to southern	1.2	4.3	94.5
Western trunk-line to southwestern	13.0	6.2	80.8
Southwestern to western trunk-line	2.0	3.0	95.0
All[1] territories to official	4.8	14.4	80.8
Official to all territories	6.7	19.4	73.9
All territories to southern	4.1	11.9	84.0
Southern to all territories	2.1	6.2	91.7
All territories to western trunk-line	2.3	5.4	92.3
Western trunk-line to all territories	1.7	.6	97.7
All territories to southwestern	5.6	10.6	83.8
Southwestern to all territories	2.0	3.9	94.1
All territories to all territories	4.1	10.7	85.2

[1] The "All" figures include Mountain-Pacific.

Within Official Territory 5.8 per cent of the carload traffic moved on class rates, while in Western Trunk-Line Territory only 0.6 per cent moved on class rates. Within Southern Territory 1.8 per cent of the total cars moved on class rates; within Southwestern Territory the figure was 2.4 per cent.

This record is replete with evidence relating to the non-use, or actual obsolescence, of class rates. The outstanding recent example of departure from the use of standard class rates was in the wholesale removal in September, 1940, of over 3000 commodities from the Southern Classification by classification exceptions. These reduced ratings were made applicable generally within Southern Territory, and between that Territory and Official Territory, purportedly to meet highway competition, and apply mostly to less-carload traffic (Ex. 38, R. 6749, 1929).

Since the creation of the existing regional class rate structures, the carriers have established exceptions ratings on a great number of commodities, which have general application within and from Southern Territory. The following tabulation shows the number of commodities subject to these exceptions ratings within Southern Territory and between that Territory and each of the other rate territories (Ex. 15, R. 6057–8, 1752). These exceptions are in addition to the 3000 mentioned above, applying generally to carload traffic and having greater scope than the 3000.

Application		*Number of Commodities*
Within Southern Territory		644
Between Southern Territory and		
Central Territory		582
Illinois Territory		606
Trunk Line and New England Territories		581
Southwestern Territory		379
Western Trunk Line Territory	Northbound	222
	Southbound	255

These tabulated exceptions ratings were originally published in the interterritorial class rate tariffs, but they soon became so bulky and voluminous that they had to be incorporated in separate books known as "Exceptions to Classification". Uniformity in these exceptions ratings is rare, and they are, like the Commission found the classifications, a "confusing array of numbers, letters and other meaningless symbols." (R. 95).

The only way fully to appreciate how incredibly and unnecessarily difficult it is to find out how much it will cost, under the present system, to make a shipment by freight, is to try to find out. An example of this process, selected at random, is set out in Appendix B of this brief, p. 267, *infra.*

An illustration of the non-use of class rates was given by a witness representing seven large rice mills in Arkansas (R. 2768–76). The interterritorial class rates on rice to Official Territory are not used by the Arkansas rice shippers, because lower motor carrier rates are available to Cairo, Illinois, and from there the rice can be reshipped east via railroad under the Official class rate level. Therefore, the railroads are not only losing a portion of the through haul on the rice tonnage from Arkansas, but it is also apparent that the present interterritorial class rates have been rendered useless and serve no purpose.

This example is representative of hundreds in the record. An expert witness representing national and New England furniture interests stated that "the Consolidated Classification ratings do not move the traffic, because they are too high and we need these exceptions." (R. 3211.) The Chairman of the Western Classification Committee testified that the Western Classification had been substantially "destroyed" by the publication of exceptions to meet motor-truck competition (R. 2232-3).

The so-called "mixture rules," which the carriers have made effective within the past few years, have further whittled away the classifications. At page 2915 of the record, a witness testified, in part, as follows:

> The grocery mixture and the hardware mixture have been presented as illustrative of the type of publications heretofore made by the railroads to regain this tonnage. There are other mixtures similar to these known as drug mixture, furniture mixture, packing house product mixture, dry goods mixture, paper and paper article mixture, etc. *The combined effect of these mixtures has been to break down the any-quantity classification rate structure throughout the Southwestern territory.* [Emphasis supplied.]

Additional inroads have been made on the classification ratings and class rates by the carriers' widespread use of so-called "all-commodity" carload rates, which apply generally on carload mixtures of items having a wide range of classification ratings, and the nationwide scope of car consolidating and distributing corporations known as "freight forwarders" (R. 2140-1).

The rate expert for the Colorado Public Utilities Commission testified:

> The class rates * * * have become, to a great extent, obsolete and should be revised * * *. If the natural resources of the various sections of the Nation are to be developed to the fullest extent, rate barriers must be removed as much as possible in order that all concerned may reach a common market on a relatively equal basis. (R. 2831-2.)

Intrastate class rates have been voluntarily abandoned by the carriers (p. 97, *supra*). While these departures from the prescribed class rate scales are more prevalent in the Southwestern and Western Trunk-Line territories, they are not confined to those areas. For example, the southern carriers voluntarily reduced the class rates in that area for distances up to 190 miles following the Commission's orders in the so-called border cases hereinbefore referred to (pp. 48-49, *supra*). The carriers have not only voluntarily eliminated the Florida arbitraries on classes 1 through 7 in connection with Florida intrastate traffic, but in addition have eliminated both the Florida and certain short-line arbitraries from the class rates applicable on a great number of commodities from points in Southern Territory to points in Official Territory.

The chairman of the Southwestern Steering Committee, J. C. Murray, testified that class rates in his territory are "too high to move the traffic" (R. 2739). Another witness testified that "the function of the primary classification in the Southwest has broken down" and that throughout the Southwest there is not very much use for the classification as such (R. 2806). Another witness indicated that the classification in the Western district had been largely broken down by exceptions (R. 2473–94), and the chief traffic officer of the Missouri-Pacific Lines admitted that the class rates for his railroad are uniformly too high to move the traffic (R. 2059).

Appellants endeavor to turn the obsolescence and breaking down of the classifications and class rate structures to their advantage by insisting that these high rates in the South and West cannot be said to hurt shippers, when the shippers have available the generally lower exception and commodity rates. Their argument seems to be that paper rates cannot hurt anyone, and that the class rates in the South and West have been demonstrated to be paper rates. The fallacy in this argument has already been pointed out (pp. 98–126, *supra*). One short answer to the argument is that industry cannot develop on discriminatory rates, and exception and commodity rates can never be obtained until the industry has been developed and shipments are ready to move. Another answer is that small shippers generally, and large shippers frequently, are unsuccessful in their attempts to get exceptions or commodity rates (R. 2758, 4763). However, there is perhaps a better answer than any of these.

The class rates are the heart of any rate structure. If they are so high that exception rates and commodity rates can, in the short space of time since the regional class rate revisions, supersede them almost completely, there is something fundamentally wrong with the rate structure. When class rates become obsolete, the hodgepodge that emerges, made up almost entirely of *ad hoc* rate adjustments, cannot accurately be called a coherent rate structure. The conversion by the carriers of class rates into paper rates, after the extensive labors of the Commission in setting up the regional class rate structures, proves that the regional class rates have become obsolete, largely by virtue of their maladjustment, region by region, with each other. The sound assigning of articles of commerce to properly related classes for rate purposes is the first and basic step in insuring the shipper, not only rates reasonable *per se*, but rates which are properly related to those of his competitors. The excessive use of *ad hoc* rates necessarily operates to break down the soundness of the rate structure.

In recognition of the foregoing circumstances shown by the record, the Commission in its report found that the class rates are obsolete, and do not move the traffic which they were designed to move, and thus require revision (R. 119, 171, 313-4). Under this evidence, it could hardly have found otherwise.

(C) *Comparative territorial costs of transportation service do not justify the existing class rate differentials*

The weight the Commission gave to the evidence on costs, and the violent and extensive attacks made on it, have prompted the inclusion in this brief of a rather detailed statement of this complicated material.[57]

(1) The problem before the Commission

The cost of rendering railroad service is an important factor which must be considered in prescribing railroad rate structures, both under the Interstate Commerce Act, Sec. 15a, and under this Court's mandate. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585. Such rate structures, having territorial application and designed to cover territory-wide revenue needs of the carriers, must necessarily reflect territory-wide operating conditions. Confronted with the problem of determining whether the differences in the costs of furnishing railroad service in the several rate territories justify the present differences in the levels and patterns of the class rate scales, the Commission found it necessary to reduce railroad expenses in the three main rate territories involved to the territorial costs for purposes of comparison.

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[57] The positions of appellants range from almost unqualified praise in No. 345 (Brief, pp. 4, 23) to almost unqualified condemnation in No. 343 (Brief, p. 122), with appellants in No. 344 somewhere in between.

The simplest method of meeting this problem of deriving territorial average costs would have been to total all of the expenses incurred by all of the railroads in each territory, and then divide these total costs by the total number of ton-miles of service performed in each territory to arrive at an over-all territorial average of the cost of a ton-mile. However, as the criticisms raised by appellants in this case indicate, this method would have been overly simplified and much too crude to afford reliable figures for cost comparisons between rate territories, inasmuch as it would have ignored certain variations in traffic conditions existing between territories, such as length of haul, etc. Furthermore, it would have violated certain well-recognized accounting principles regarding the fundamental nature of transportation costs and the breaking down and analyzing of expenses in order to identify, in so far as possible, each kind of expense with the particular class of transportation service in which it was incurred. This Court has made it mandatory that such principles be adhered to in cost finding for rate-making purposes, in the *Northern Pacific* case:

> The outlays that exclusively pertain to a given class of traffic must be assigned to

> that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account. (236 U. S. 597.)

The other extreme would have been for the Commission to attempt to work out a weighted average cost for each territory by tracing the history of every shipment made in that territory over an extended period, and to weight all the costs in such a manner as to take into consideration all variations in every factor and condition found. While this would have been an almost impossibly cumbersome task, the method employed and the selection of units made by the Commission was the statistical equivalent of this procedure (Ex. 196, R. 11273, 4352).

The result was a cost study prepared under the supervision of the witness Ford K. Edwards, the Commission's head cost analyst, which appellants in No. 345 call the most elaborate and comprehensive ever undertaken in the transportation field.

Railroad costs are fundamentally divisible into two components: First, those expenses which vary directly with the volume of traffic handled, are directly assignable to particular kinds of traffic or service, and are usually referred to as "direct", "variable", or "out-of-pocket" expenses; and second, the remaining expenses, which are of a fixed or constant character, cannot be directly associated with any particular part of the service or traffic but rest as a burden on the railroad service as a whole, and are commonly designated as "indirect", "fixed", or "constant" costs.

As to the information available for the cost study, the railroad accounting records and classifications for operating expenses are sufficiently uniform and complete that most of the expenses are set forth and can be directly assigned to particular services performed. Where necessary, questionnaires were issued to the carriers for the purpose of developing the needed accounting and statistical data not available from the carriers' annual reports to the Commission (Ex. 2, R. 5201-2, 1558).

Where the breakdown of such information was not already available, the Commission drew upon the many previous related investigations, or made new supplementary studies to provide proper bases for some aspects of the process of separating and relating expenses and services performed (Ex. 2, R. 5245-9, 1558; Ex. 11, R. 5689-5708, 2872).

All property values used in the cost study were furnished by the Commission's Bureau of Valuation (Ex. 2, R. 5198, 1558).

The railroads were assigned to the territories in which they operated. Where a carrier operated in more than one territory, it was broken up by divisions and each division assigned to that territory in which the major portion of its trackage lay (Ex. 2, R. 5148-60, 1558).

(2) The method employed by the Commission

The expenses of the carriers were first broken down and translated into the territorial average unit costs of performing each of the kinds of services involved in moving a specific shipment or in furnishing a given amount of transportation service in each territory, and then these unit costs were multiplied by the number of units of each of the services found to be employed in moving this specific shipment or furnishing the given amount of service. The resulting total expenses represented the total average cost of moving this shipment or furnishing the given amount of service in the territory. Then the process was repeated for a sufficient number of different shipments or services to make the results fully representative of the territory under consideration.

The foregoing is merely a general outline or summary of the plan of the cost-finding technique used by the Commission, and has been interjected here for the sake of perspective in approaching the more exact and detailed explanation which is provided in the following paragraphs.

(a) *Describing a shipment in terms of work performed*

In the Commission's cost study it is recognized that any shipment can be broken down into homogeneous "units of service." (Ex. 196, R.

11264–5, 4352). Consider, for example, the manner in which a 300-mile haul in a box car carrying 25 tons (weight of empty car 22 tons) can be broken down into such units of service.

At the beginning of the shipment, switch engines take the car off of the shipper's siding and assemble it with other cars to form a train. Thus, an "origin switch" is performed, which is expressed (in part) in terms of "engine minutes" consumed. The loaded car is hauled 300 miles, yielding the following units of service: 300 "car-miles", 7,500 "net ton-miles" (computed by multiplying the 300-mile haul by the 25 tons carried in the car), and 14,100 "gross ton-miles" (computed by multiplying the 300-mile haul by the total weight hauled, which is equal to the 25 tons carried in the car, plus the weight of the car itself which equals 22 tons). For example, at an average rate of speed of 12½ m. p. h., the 300-mile haul will take 24 hours, yielding one "car-day". At junction points, cabooses are dropped, cars switched in and out of the train, etc., producing an "intra-train" switch" or an "inter-train switch". At the destination the car is switched on to the siding of the consignee, producing a "destination switch". Each shipment obviously necessitates the billing of a consignment, giving rise to a "consignment billed".

When the consignee has unloaded the car, it must be returned, generating empty return expenses. Recognition is given in the Commission's study to the fact that the percentage of empty return varies from territory to territory. For purposes of this illustration, a figure of 33⅓% will be used. Thus, for example, on the empty return there are generated 2,200 gross ton-miles (33⅓% of 6,600 gross ton- miles), ⅓ of a car-day, etc.

In this way, a shipment is described in terms of the work performed (Ex. 196, R. 11264–5, 4352).

(b) *How and why the service units used in apportioning the direct costs were selected*

The selection of the service units with which to apportion the costs depends upon the purpose of the costs study. Where direct costs are desired for a given carload shipment handled between two specific points, which reflect the weight of the particular train in which the shipment is handled, the grades encountered, the class of engines used, the engine-minutes of switching service rendered at the origin, intermediate, and destination points, etc., the units of performance would be selected accordingly. Locomotive-miles by classes of engines, locomotive ton-miles, helper locomotive-miles, train-miles, trailing gross ton-miles, etc. would necessarily have to be computed point-to-point, and engine-district by engine-district. The result would reflect the minute variations in costs due to grades, topography, size of terminals, differences in locomotive power, etc.

Such differences are obviously myriad even on a single railroad. On the other hand, rate structures which have territorial application and which are designed to provide territory-wide revenue must reflect territory-wide operating conditions. It is such rate structures which were here under consideration and the cost study was designed accordingly. The results represent a weighted average of all conditions, i. e., main-line and branch-line operation, through-train and way-train operation, operation on lines of heavy traffic density and lines of light traffic density, and the switching performed in large terminals and small terminals (Ex. 2, R. 5143, 1558; Ex. 196, R. 11273, 4352). Nothing less than this would reflect the level of the transportation costs in the respective territories taken as a whole.

On carload traffic, all the direct or out-of-pocket operating expenses were reduced to three types of major revenue service units: (1) car-miles, (2) gross ton-miles, and (3) carloads. There were seven ultimate major service units related to one or another of these three types (Ex. 2, R. 5194, 1558).

The theory of choosing service units was to work toward final costs scales in terms of (a) line haul or running expenses, and (b) terminal expenses, both expressed in cents per hundred pounds (the line-haul cost in cents per hundred pounds per mile). In achieving this final line-haul and terminal breakdown, the seven major service units, referred to above, were used. However, in order to arrive at unit costs for these seven major service units—four of which were related to length of haul, with the other three independent of the length of haul—it was necessary to use a great many subsidiary service units, where a given item of expense, as reported by the carriers, had to be broken up for assignment among two or more of the major units. Whereas an item of expense like station maintenance would be assigned entirely to one of the major units independent of the length of haul, on the other hand an expense like freight car maintenance would have to be broken up for partial assignment among two or more of the service units. For example, considering freight car maintenance expenses, paint is related to car days—not one of the major units—and must be separated into line-haul and terminal proportions, on the basis of the car days consumed. Other freight car maintenance expenses, like repairs to wheels, are related solely to car miles (Ex. 2, R. 5191, 1558; Ex. 4, R. 5426, 1570). Thus, although ultimately only seven major revenue service units were used, there were many sub-units used in the process of breaking up individual reported items of expenses into the portions properly assignable to each of the seven major revenue service units.

On less-carload traffic, a similar process was used, with appropriate variations, which involved ten major service units (Ex. 2, R. 5195).

Through the use of the units selected, the study reflected the weight of the load, the length of the haul, the type of equipment used, the tare weight of the equipment, and the amount of empty-return movement. A supplementary study was made to show the influence on the cost comparisons of separating the trains hauling coal and ore in solid trainloads from the trains hauling all other traffic. The resulting influence on the cost study was found to be too small to affect significantly the territorial comparisons (Ex. 196, R. 11332-7, 4352).

(c) *Attributing the expenses incurred to the units of service performed*

The production of each of the units of service necessarily generates specific expenses, such as clerical expense, maintenance of tracks, etc. The following additional examples are illustrative.

In origin switching, a switch engine is employed for a certain number of minutes. The fuel consumed, the wages of the engine crew, the wear and tear on the engine, etc., vary with the number of minutes the engine is employed in making that switch. Knowing the average number of minutes consumed in an origin switching movement, and the cost per engine minute, it is possible to determine the expense attributable to the engine minutes in this switching movement, which ultimately finds its way into terminal expenses.

On a line haul, certain expenses vary with gross ton-miles. For example, the wear and tear on the track is largely determined by the total weight moving over the tracks, and the fuel consumed in drawing the train is largely determined by the total weight which is being pulled. Those expenses, therefore, are distributed on a gross ton-mile basis (Ex. 2, R. 5194, 1558; Ex. 4, R. 5431, 5433, 5445, 1570).

Inter-train and intra-train switching expenses vary with the number of cars involved and the length of haul. Obviously the cars must be switched whether empty or full, so that inter-train or intra-train switching is not appreciably related to the tonnage. Hence, such expenses are distributed on the basis of car miles (Ex. 2, R. 5194, 1558; Ex. 4, R. 5445, 1570).

The clerical expense of billing is determined by the number of consignments billed, hence it is a function of the number of cars consigned (Ex. 2, R. 5194, 1558; Ex. 4, R. 5434, 1570).

All of the expenses which vary with the number of units of service produced were in a similar fashion assigned to the appropriate units of service (Ex. 196, R. 11264–5, 4352; Ex. 2, R. 5191–5202, 1558.)

The problem of distributing the direct or out-of-pocket expenses of each territory, therefore, resolves itself, on the one hand, into accumulating from the accounting records (and certain other sources) all of the expenses incurred in a given accounting period, and, on the other hand, into accumulating from the railroad's annual reports and from questionnaires the total volume of units of service produced in that accounting period. By dividing the total number of units of a specific type of service into the total expense incurred in performing that service, the territorial average cost of a unit of that service is obtained.

To sum up, the direct expenses were related to those service units with which the expenses were found to be directly variable, i. e., related to those units the production of which occasioned the expense.

Since any specific shipment (e. g., a 300-mile haul in a box car carrying 25 tons) can be broken down into a specific number of units of service, the determination of the territorial average out-of-pocket cost of a specific haul is simply a matter of multiplying the number of each of the units of service consumed in that shipment by its territorial average unit cost and adding up the accumulated costs.

(d) *Indirect or constant costs*

The procedure just described took care of the direct or out-of-pocket expenses. In previous transportation cost studies, the constant costs have usually been apportioned on the basis of the direct or variable costs, i. e., a fixed amount of such constant costs was added to each dollar of direct expense. This method of allocation has the defect of assigning a disproportionate part of the constant costs to shipments with relatively large direct costs per hundred pounds, such as light-loading traffic.

An alternative method is to allocate the constant costs on the basis of revenue units, that is, to give them a pro rata distribution over the total transportation service rendered, as measured in revenue tons and ton-miles. Thus, the constant terminal costs which are unrelated to the length of haul are given a pro rata distribution by charging a fixed amount of such expenses over the total revenue tons originated or terminated. All other constant costs, i. e., those related to distance, are spread evenly over the total revenue ton-miles. The Commission used both methods of allocating the constant costs, but relied more heavily upon the results of this alternative method (Ex. 12, R. 5751–3, 2872). Both methods, however, produced substantially the same results so far as the relative territorial average costs are concerned (Ex. 12, R. 5754–6, 2872; 1739–40).

Direct or out-of-pocket costs plus the indirect or constant costs are referred to as "fully distributed costs." Both the out-of-pocket and the constant costs were considered in the territorial comparisons by the Commission, in accordance with the mandate laid down by this Court in the *Northern Pacific* case.

(3) The construction of cost scales

Out-of-pocket costs plus the constant costs, i. e., the fully distributed costs, are the basis upon which the "cost scales" were constructed. In the table below is shown a small sample of data from the territorial cost scales (Ex. 13, R. 5920, 5925, 1742; Ex. 195, 11359–63, 4352).

Terminal costs in cents per 100 lbs. and line haul costs in cents per 100 lbs. per mile for various weight loads for box cars in carloads, 1939, Eastern Territory

	5 tons		*15 tons*		*60 tons*	
	Terminal Haul	*Line Haul*	*Terminal Haul*	*Line Haul*	*Terminal Haul*	*Line Haul*
Out-of-pocket costs:						
Operating expenses, rents and taxes	13.404	0.076300	4.468	0.028867	1.117	0.011079
Return on equipment (4%)	1.222	.003550	.407	.001250	.102	.000388
Return on road (4%)	.940	.009550	.313	.003883	.078	.001758
Subtotal	15.566	.089400	5.188	.034000	1.297	.013225
Constant costs	1.497	.015063	1.497	.015063	1.497	.015063
Fully distributed costs	17.063	.104463	6.685	.049063	2.794	.028288

Carload cost scales were computed for each of the rate territories for box cars, gondola and hopper cars, tank cars, stock cars, and refrigerator cars for all possible loads (to the nearest ton). Cost scales for less-carload traffic handled in box cars (to the nearest half-ton) were also computed (Ex. 13, R. 5922, 5924, 5926, 5928, 5930, 5932, 1742; Ex. 195, R. 11360, 11362, 4352). Additional scales were computed by combining and excluding various sections of each territory (e. g., Official with and without Pocahontas),[58] in accordance with the various suggestions of the appellants and other parties before the Commission. The cost scales are the basic framework of the entire study and must be understood in order to evaluate the territorial cost comparisons shown below.

(4) Procedures in territorial cost comparisons

Once having computed the average costs for each rate territory, the Commission was in a position to compare territorial average costs, which was the real purpose in making the cost study. The principal comparisons made were based on the year 1939, but supplementary studies were also made showing the relative costs for the periods 1930–39, inclusive, 1937–41, inclusive, and 1941.[59]

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[58] Pocahontas is not literally a geographical entity, but, for the purpose of this study, is the operations of three railroads, the Chesapeake & Ohio, the Norfolk & Western, and the Virginian, which predominantly are carriers of coal (85% of their freight traffic) (R. 1559).

The territorial cost comparisons were most exhaustive, ranging from a showing of the costs of hauling given weight loads in a certain type of car for given distances in each territory, to a showing of the relative costs of hauling the entire traffic consist of each territory, East, South, and West, respectively: First, in the territory in which it actually moved, and second, in each of the remaining territories, the purpose in this being to eliminate the effects of any differences in the consist (composition) of traffic between the territories compared. The comparisons and analyses included both the out-of-pocket or direct costs and the fully distributed costs. They gave consideration to the freight moving for a wide range of distances in every type of equipment: box, gondola, tank, stock, flat, and refrigerator cars (Ex. 2, R. 5161–79, 1558; Ex. 12, R. 5754–6, 2872; Ex. 195, R. 11359–67, 4352; Ex. 13, R. 5920–32, 1742; Ex. 196, R. 11259–62, 4352).

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[59] The western railroad appellants insist that there are no valid costs figures for 1941. They lose sight of the fact that although costs of different territories cannot be compared in terms of one unit alone, like revenue ton-miles, the changes in costs within a single territory can be compared in terms of basic units, with results substantially as accurate as if an entire new costs study were made. The validity of comparisons within a territory, and the unreliability of such comparisons between such territories, is explained by the fact that within a territory, transportation conditions are necessarily rather constant. The 1941 cost study utilized not only revenue ton-mile cost comparisons, but also comparisons in terms of gross ton-miles, less-carload tons originated and terminated, cars handled in terminals, and loaded-car miles (Ex. 11, R. 5081–8; Ex. 195, R. 11383).

Costs were compared for identical loads hauled in the principal types of equipment, using 25-ton loads for box cars and 50-ton loads for gondola and hopper cars. These two types of cars account for the preponderant part of the traffic actually carried. Comparative territorial costs were also computed for box cars using in each territory the average weight load experienced in that territory for box cars. Similar comparisons were made for each of the remaining types of equipment. These comparisons had the effect of eliminating, or adjusting for, the different types of equipment used and the different average loads between territories (Ex. 2, R. 5163–5, 1558).

Comparisons were also made of the cost of hauling the entire consist of the traffic of one territory, at the average loads and unit costs applicable in that territory, with the cost of hauling the identical traffic at the average loads and unit costs obtained in other territories (Ex. 2, R. 5161–79, 1558; Ex. 195, R. 11401–2, 4352; Ex. 196, R. 11259–60, 4352). For example, a comparison was made of the expense of hauling the Southern Territory box-car traffic a distance of 300 miles at the average load for each commodity using Southern unit costs, with the cost of hauling this identical traffic a distance of 300 miles at the average loads and unit costs obtaining in the Eastern Territory. Similar comparisons were made using the Eastern consist of box-car traffic. Like studies were also made for gondola and hopper-car traffic.

The Commission had before it cost comparisons showing the cost of hauling the entire traffic consist of each major territory for distances of 100, 300, and 500 miles at the unit costs and actual average weight loads obtaining in each territory (R. 190–2; Ex. 13, R. 5920–32, 1742; Ex. 195, R. 11359–63, 4352). This comparison was followed by an analysis of the relative cost of hauling the entire United States, Eastern, Southern, and Western consist of traffic, respectively, in each of the several territories at the unit costs and actual average loads (by classes of equipment) computed for such territories. This comparison was not limited to any given mileage, as the costs were computed for the actual distances the traffic actually moved (Ex. 195, R. 11363, 4352).

(5) Results of the territorial cost comparisons

The various territorial comparisons reviewed above indicate that in the pre-war period there was little significant difference between the level of the cost of furnishing railroad transportation service in the South and that in the East, excluding the Pocahontas region. The figures both for the year 1939 and the period 1930-1939 indicate that, taken as a whole, the levels of the costs in the South and West were not significantly different from the level for the East (Ex. 2, R. 5161-2, 1558; Ex. 12, R. 5754-6, 2872; Ex. 195, R. 11364-7, 4352; Ex. 196, R. 11257-62, 4352). The increase in freight traffic volume handled by the carriers subsequent to the year 1939 served to reduce the unit costs of transportation in the South and West to a greater degree than in the East. The reason is that the East, with its higher traffic density, is closer to the maximum capacity of its railroad plant than the other districts, and hence the expenses increase more nearly in proportion to the added volume of traffic carried than is true elsewhere. Between 1939 and 1941 the unit costs decreased by about 5 percent in the East and the Pocahontas region, as compared to decreases of something in excess of 10 per cent in the South and West (Ex. 11, R. 5682, 2872; Ex. 195, R. 11383-4, 4352). Since the 1941 traffic level is generally expected to prevail in the post-war period, territorial cost levels will probably possess a greater degree of equality than was shown by the 1939 cost comparisons, and there is good ground for placing chief reliance on the results of the later showing.[60]

The elaborate territorial costs comparisons described above are reflected principally in the Edwards testimony (R. 39–187; 203–212; 315–319; 330–348; 2184–2227; 3209–32; 3235–51; 4584–4655; 3505–19; 3520–30; 4348–94; 1553–1646; 1657–63; 1728–30; 1738–48; 2866–92) and exhibits (Exs. 2–4; 10–13; 195, 196). Verification of their unmistakable meaning—that costs in the three major territories do not differ substantially, the East being generally slightly above the South and slightly below the West, in average territorial costs—can readily be obtained in detail by these references.

The fact that so many different sets of comparisons were made, and that the field of possible comparisons was explored so exhaustively (in many instances at the request of appellants, in their effort to find some basis of narrow comparison which would point in their direction), necessarily means that somewhere among these comparisons isolated figures can be picked up from the evidence to demonstrate extremes. It is these extreme figures, which were found by the Commission to be unrepresentative, on which appellants, and particularly the western carriers which are appellants in No. 345, place their main reliance.[61] The less-carload West-East cost comparisons will be treated in the later section of this brief on confiscation, but it now seems desirable to clear up possible misapprehensions about the *general* West-East cost comparisons.

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[60] Postwar Traffic Levels (revised edition), 1944, Bureau of Transport Economics and Statistics, Interstate Commerce Commission. Actually, traffic in the first postwar year was on a much higher level than 1941. *Ex Parte* 162, decided Dec. 5, 1946, unreported. In the 12 months ended October 31, 1946, the revenue tons carried in the West were 26% higher than for the year 1941, and the revenue ton miles were 43% higher than in 1941. *I. C. C. Statistics of Railways in the United States*, 1941; I. C. C. Monthly Statement M–220, *Revenue Traffic Statistics*, published December 1946.

The great bulk of class rate traffic moves in boxcars. On an out-of-pocket cost basis, using boxcar traffic costs, the costs in the West are uniformly below the Eastern costs (R. 192; Ex. 13, R. 5920–31, 1742; Ex. 195, R. 11359–63, 4352; Ex. 196, R. 11258–9, 4352). In 1939, the fully distributed costs on boxcar traffic for average actual loads for the typical distance of 300 miles shows only a 5% difference between costs for the East and the West, and a difference of 3% for the shorter distance of 100 miles. If the 1941 cost figures are used, there is even less difference between eastern and western costs, regardless of factors used. The following table gives the 1939 figures (Ex. 196, R. 11259; Ex. 195, R. 11392–4):

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[61] e. g., comparing the West with Pocahontas alone, Brief, No. 345, pp. 8, 17, 52.

Relative territorial costs (1939) for traffic moving 300 miles in box cars and gondola cars

[U. S. average = 100]

	Box cars		Gondola and hopper cars	
	25 ton load	Actual load	50 ton load	Actual load
Eastern	102	103	100	100
Southern	96	97	99	102
Western	108	108	109	115

An over-all comparison based on all six types of equipment, the cost for each type of equipment being weighted for the revenue ton-miles handled in the United States in each class of car (Ex. 196, R. 11260–1; Ex. 195, R. 11392–4) shows these cost comparisons:

Relative territorial costs (1939) for all traffic moving 300 miles

[U. S. average = 100]

	Identical loads	Actual loads
Eastern including New England	102	102
Pocahontas	67	67
Eastern including New England and Pocahontas	95	95
Southern	98	101
Western	108	110

Exhibit 3, comparing the East with Western Trunk-Line and Southwestern territories on various cost levels, shows that in many instances costs in the East are equal to or higher than costs in the West. For example, using 25 tons as an average load and 300 miles as an average haul, the cost II level for box car traffic, which includes all costs but makes no allowance for return on value or passenger and less-carload deficits, shows the following (in cents per 100 pounds):

	Cents
East (excluding New England and northern Illinois)	11.6
East (including New England and northern Illinois)	11.6
Southwestern (including southern Missouri)	11.1
Western Trunk-Line (excluding northern Illinois and southern Missouri)	11.0
Western Trunk-Line (including northern Illinois and excluding southern Missouri)	11.1

The cost V level, which includes the three factors excluded from the cost II level, shows Eastern costs to be slightly below Western Trunk-Line costs but slightly above Southwestern costs.

These illustrations could be multiplied many times. If the Court desires to examine all the territorial cost comparisons that were made, it is believed that it will be apparent that the findings of the Commission that average territorial costs do not differ substantially as between territories were proper. Certainly no one could claim that they differ to an extent anything like the 37 to 60% territorial class rate differentials.

There is one more very significant comparison which appellants have not brought to the attention of the Court, namely, the territorial freight operating ratios, i. e., the ratio of freight revenues to freight operating expenses, set out in the following table (R. 259, with 1944 figures added, see R. 4777–8, 885–7):

	1941	1942	1943	1944
Eastern	63.04	61.93	66.23	71.73
Southern	61.07	56.84	59.41	64.59
Western	60.92	55.79	59.47	62.69

These operating ratios show what it really costs in each territory to carry freight alone, compared with the revenues from such carriage. These operating ratio figures are the answer to appellants' syllogism that the Western costs are 21% higher than the Eastern costs. Appellants, in reaching this conclusion for 1939, by comparing revenue and rate-of-return levels, mix figures for freight revenues only, with rate-of-return figures for both passengers and freight. The passenger deficits and passenger operating figures in the West are far more unfavorable than in the East. Excluding commutation traffic, the Western revenue per passenger mile in 1939 was only 77% of the Eastern figure, and operating revenues for passenger and allied services in the West in that year were only 64% of operating expenses, rents, and taxes for such services compared with 80% in the East (Ex. 2, R. 5185). Further, the western roads have complained for years about their inadequate share of divisions with the eastern roads (see I. C. C. Docket No. 28277), and readjustment of divisions is the appropriate cure for this kind of a revenue problem. *New England Divisions Case,* 261 U. S. 184.

(6) Inclusion of Pocahontas with the East

The grouping of the Pocahontas region with the East for cost study purposes has been the subject of much controversy. However, if the comparisons are based on 1941, the question of the treatment of the Pocahontas region becomes moot (R. 206; Ex. 215, R. 11635–6, 4659).

The Commission in the past has found it necessary to consider the needs of the other eastern carriers separate and apart from the needs of the Pocahontas lines, as is indicated in its decision in *General Commodity Rate Increases,*[illegible] where it was stated that the sole justification for increasing the bituminous coal rates for the Pocahontas lines lay in the "needs of the other railroads." In short, the level of the Eastern rate structure on coal, to say nothing of class rate traffic, was aimed, for all practical purposes, at the needs of the non-Pocahontas lines. The Pocahontas lines cannot be given lower rates than their competitors which earn less money, because this would divert even more traffic to the Pocahontas lines and make them even more profitable in relation to the other roads.

As the traffic consist of the Commonwealth of Kentucky is heavily weighted with coal, there may be some ground for excluding Kentucky from the South for the same reason that the Pocahontas lines were excluded from the East (Ex. 196, R. 11257–60, 4352). On this basis, the 1939 costs for the East (including New England but excluding Pocahontas) were approximately the same as the costs for the South, excluding Kentucky (Ex. 196,

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[illegible] *Ex Parte 115,* 223 I. C. C. 657 (1937).

R. 11259–61, 4352). If the period 1937–41 were used, the costs would be lower in the South (Ex. 215, R. 11622–38, 4659).

(7) Consideration of criticisms of the cost study

Various criticisms of the cost study were made. Some were directed to such items as separations of running and train-switching expenses, the exclusion of intraterminal switch cars, and the count of less-carload and carload tonnage handled. Adjustments for the more significant items of this character were made and introduced in the record. They had but a negligible effect on the territorial cost comparisons (Ex. 195, R. 11392–5, 4352).

Other criticisms were directed to the apportionment factors used in the cost formula, such as the relative weight given to each class of switching service; the car-day allowances for loading, unloading, and switching of freight-train cars; the separation of station clerical expenses between carload and less-than-carload; and the ratio of empty to loaded mileage by classes of equipment. In support of the factors used, the witness Edwards referred to various special studies made for the purpose of this and other cases, and to his analysis of data of a similar character introduced by carriers in other proceedings. He also introduced a series of tables showing the effect on the cost scales of numerous possible variations in the factors used, the result in most cases being but a negligible shift in the expenses from one type of car to another type of car, or from one length of haul to another length of haul. This followed from the fact that most of the apportionment factors, while reflecting the relative cost for one class of work relative to another class of work, had no influence on the total known operating expenses (Ex. 2, R. 5224–44, 1558). Allowance made in the study for empty car-miles by classes of equipment based on responses to questionnaires directed to the carriers were reconciled with the carriers' total empty miles reported by regions for all classes of equipment (Ex. 196, R. 11323–4, 4352).

Appellants in No. 343 contend the costs figures were wholly valueless because they contain no figures for class rate traffic alone, as distinguished from commodity and exception rate traffic. However, in the next breath, those appellants destroy the basis for their contention by asserting that the costs involved in any particular movement are the same, whether the freight moves on class or commodity rates (Brief, p. 115). The method of billing has nothing to do with operating costs.

A convincing test of any cost formula is to apply the cost scales developed in the study to the traffic handled, commodity by commodity. The resulting costs, when aggregated for a period of time, should reconcile with the carriers' total reported expenditures for that period. The carriers stated that, from an accounting standpoint, such a check should have been made. The witness Edwards made such verification for four principal territories, applying the 1939 costs to the 1939 traffic. The results are shown below (Ex. 196, R. 11291-2, 4352):

Territory (1)	Aggregate expenses, increased by a 4-percent return computed by applying costs to traffic handled (1939) (2)	Actual expenses as reported by carriers increased by a 4-percent return (1939) (3)	Ratio (percent) of computed expenses to actual expenses (4)
Eastern	$1,426,950,260	$1,451,484,949	98.3
Pocahontas	183,076,590	185,387,990	98.8
Southern	450,448,155	449,001,663	100.3
Western	1,382,549,982	1,395,188,845	99.1
United States (lines 1-4)	3,443,024,987	3,481,063,447	98.9

The territorial total expenses obtained by applying the cost scales to the 1939 traffic handled thus differed on the average by only about one per cent from the carriers' known expenses for 1939, and part of this difference lay in the fact that the boundaries of the districts and regions used in the assembly of the commodity statistics did not exactly coincide with the boundaries used for the cost study. Furthermore, this test was made prior to the correction of the cost scales to meet certain of the criticisms lodged by some of the respondents. Certainly, whatever errors might exist in the study, they had no significant effect on the showing of the relative levels of the cost of performing transportation service in the respective territories.

Criticism was made of the rate-making values used, the figures being based on data furnished by the Commission's Bureau of Valuation. This criticism has little weight, however, as the relation between the Bureau's rate-making value and the carriers' book investment differed little by territories. The comparisons of relative territorial costs would be little affected regardless of whose valuation figures were used (Ex. 196, R. 11295–6, 4352).

Criticism was made of the carrier and territorial groupings used in the Edwards studies. However, Edwards subsequently reworked the costs to show all combinations of regions and areas requested by any of the parties (Ex. 195, R. 11359–63, 4352; Ex. 196 R. 11257–62, 4352).

(8) Factors corroborating the Commission's cost study

(a) *Various operating and statistical data*

The reasonableness of the showing that there is relatively little difference in the costs for the three territories is supported by various operating and statistical data. For example, the contention that the traffic density of the eastern roads exceeds that of the southern and western roads, with more cars per train, and therefore the Eastern costs must be lower, overlooks the fact that there are many compensating factors at work. In 1939 the South had a lower compensation per employee per annum than the East, $1,753 versus $1,925; a lower ratio of empty to loaded car-miles, 57.6 versus 60.5; more miles actually run per hour per train and engine employee in freight service, 14.1 versus 11.5; more transportation service car-miles per employee, i. e., 26,459 versus 24,012. Furthermore, the effect of lighter trains and smaller loads in the South was more or less compensated for by lower train-mile costs. Although the revenue net ton-miles per train-mile of 553 in the South constituted only 62.5 percent of the corresponding figure of 885 in the East, the expenses per train-mile in the South of $3.69 were only 61.6 per cent of the corresponding figure of $5.99 in the East (Ex. 196, R. 11264, 4352). The foregoing figures, pointing to a similarity, at least, in the line-haul costs in the two territories, bear out the results of the cost study which showed such costs to be not very different in the two territories. It is true that on some traffic the Southern line-haul costs were found to exceed those for the East. On the other hand, the terminal costs in the South were found to be much lower than those in the East, where expensive switching is incurred in the numerous large industrial centers (Ex. 13, R. 5925, 5929, 1742; Ex. 196, 11264, 4352).

A similar comparison of the operating and statistical data for the West and East shows the following results. In 1939 the West had a lower compensation per employee per annum than the East, $1,892 versus $1,925; a lower ratio of empty to loaded car-miles, 59.7 versus 60.5; more miles actually run per hour per train and engine employee in freight service, 14.0 versus 11.5; more transportation service car-miles per employee, 29,341 versus 24,012. Furthermore, the effect of lighter trains and smaller loads in the West was more or less compensated for by lower train-mile costs. Although the revenue net ton-miles per train-mile of 604 in the West constituted only 68.2 per cent of the corresponding figure of 885 in the East, the expenses per train-mile in the West of $4.14 were only 69.1 percent of the corresponding figure of $5.99 in the East.[63]

(b) *The southern carriers' cost study*

The southern carriers introduced territorial cost comparisons based on average net ton-mile costs, adjusted for differences in the length of haul and the consist of the traffic. The studies covered the 10 years 1930–1939 (Ex. 181, R. 10876–82, 4042). Obvious statistical deficiencies present in the studies were removed and a restatement of the southern carriers' study, based on the application of the Southern unit costs and the Eastern unit costs, respectively, to the Eastern consist of traffic, showed the costs for the South to be approximately 1 to 2 per cent below those for the East, excluding the Pocahontas Territory. Practically the same results are obtained by using the Southern consist of traffic (Ex. 195, R. 11364–7, 4352; Ex. 196, R. 11293–7, 4352).

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[63] *Statistics of Railways in the United States*, 1939, Table 165, and Ex. 16 (R. 6179).

(c) *The eastern carriers' cost study*

The eastern carriers introduced the same type of cost comparisons based on 1937–41, a period which reflects the increased traffic volume of 1940 and 1941. The costs for the South were found to be approximately the same as those for the East, even including the Pocahontas Region (Ex. 215, R. 11635–6, 4659).

(d) *Comparison of rates of return*

Excluding non-operating income, the rate of return in the South has in fact exceeded that in the East four years out of the six-year period 1936–41, and in five years out of the seven-year period 1936–42. Over the six-year period 1936–41 the return in the South averaged 2.69% against 2.47% for the East. In 1939 the southern carriers earned 3.50% as compared to 3.15% for the eastern carriers. In 1943, the Southern figure was 5.73% against 4.32% for the East; in 1944 it was 4.64% against 3.44%; and in 1945 the South had 5.38%, the East 4.30%.

Before the war, the rate of return averages were somewhat lower in the West than in the East, but since then the West has been consistently ahead of the East. The rate of return in the West in 1942 was 5.80% compared with 4.90% in the East; in 1943, the West was 5.22% compared to 4.32% for the East; in 1944, the West was 4.17% compared to 3.44% for the East; and in 1945, the Western rate was 5.71% compared to 4.30% for the East (I. C. C. *Statistics of Railways in the United States,* 1939-1944, see R. 4777–8, 885–7 for stipulation; 1945 figures from *Ex Parte 162,* decided June 20, 1946, by the Commission, 264 I. C. C. 695). If it should be contended that these figures are for war years, it might be answered that although the final 1946 figures are not yet available, the western and eastern carriers' own estimates for 1946 income amounts, a year of peace, submitted by them as evidence in *Ex Parte 162,* yield a rate of return figure of 2.59% for the West against .53% for the East, a greater disproportion than existed in any of the war years. These 1946 figures appear in the Commission's decision on the merits in *Ex Parte 162,* handed down December 5, 1946, not yet reported (mimeographed sheet 7).

(9) Summary—the Commission's cost findings have not been successfully challenged

In spite of elaborate attacks on the East-South costs comparisons in the two tribunals below, the southern and eastern carriers are not parties to the proceedings here, and no attack on the East-South comparisons, on separate grounds from the attack on the East-West comparisons, is being made in this Court.

The western carriers praise the cost studies on which the Commission relied, and themselves rely heavily on the results of these studies. On the basis of these studies, the Commission found explicitly that the costs of the several territories were not sufficiently different to warrant territorial rate differentials (R. 309), and, more specifically, that as of 1941 the over-all costs in the West differed from the costs in the East by "5% or less" (R. 206). The western carriers, on the basis of the same studies, apparently are differing with the Commission only on the question of what the studies mean. But the Commission was the judge of the evidence before it. The evidence supported the Commission's findings about differences in costs, and the western carriers are not quarreling with the evidence. Their sole point seems to be that they, and not the Commission, have the right to decide which facts in the costs study are entitled to the most weight. Even a court is not inclined to assert this kind of responsibility about the relative weight of different segments of evidence.

If all of the reasoning above about costs were rejected, the fact remains that no one seriously asserts in this proceeding that the western costs are higher than the eastern costs by anything like the 60% difference between the class rates in the Southwest, or the 50% difference in class rates in Western Trunk-Line Territory, when these class rates are compared with the Official class rates. Even if the argument that costs in the West are substantially higher than costs in the East should be accepted, there would be no justification for the present singling out of the class rate traffic in the West for the payment of exorbitantly high rates. The small amount of class rate traffic that moves in the West is largely the traffic of small shippers who are unable to exert enough economic influence to secure lower commodity or exception rates which have been secured by over 99% of the shippers in Western Trunk-Line Territory. Whatever conclusions may be reached about costs, they cannot support this kind of discrimination against the class rate traffic alone, and against the small, impotent shippers who still are using the class rates (R. 4752).

(D) *Differing consists and volumes of traffic within the territories are no justification for the class rate differentials*

Appellants have advanced two principal arguments against a uniform level of class rates in the rate-making territories under consideration here, based on differences in the traffic of the territories. These are: First, that the consists of traffic are so different in the several territories that separate rate structures with different distributions of the transportation burden between commodities and classes of traffic are necessary; and second, that because of the greater volume of traffic, and particularly the greater percentage of high-grade traffic in Official Territory, a lower and different system of class rates in that territory than in the others is required.

The Commission's position on these two points is that admittedly there are substantial differences in the consists and volumes of the several territories involved; that these differences constitute a matter for its consideration, that it has given them full and careful consideration, but that it has not found sufficient differences *for revenue purposes* to justify the present differences in class rates as between the territories (R. 309-10).

In more detail, the data before the Commission show that a large volume of all traffic flows across territorial boundaries and therefore becomes common to two or more territories.[84] This fact eliminates a considerable percentage of the traffic from consideration in dealing with differences in consists.

Appellants tend to emphasize the details in differences in consists by pointing out how the volume of traffic in a single commodity varies in two territories, instead of considering territory-wide consists. On appellants' basis, there are the same differences in consists to be found *within* the boundaries of each present territory. In other words, the differences in consists cited by appellants as a basis for a difference in rates between territories do not end abruptly at territorial boundaries but occur within each territory, within each railroad system, and in many instances within each division of a system. At the same time, appellants somewhat inconsistently, complain very vigorously about any separation of the Pocahontas lines from Official Territory, although these lines serve as an extreme example of just what appellants talk about with respect to territorial differences in consists. The Pocahontas traffic consist, when compared with that in Official Territory, is not only substantially different but almost wholly so, in that it is made up predominantly of coal (Ex. 195, R. 11376–9, 4352; Ex. 196, R. 11334, 1559). In Official Territory, as well as in Southern and Western territories, such coal traffic as is carried, although substantial in some instances, is well diffused with a great variety of other traffic. Outside of such extreme examples as Pocahontas and the Commonwealth of Kentucky, it is this diffusion of traffic that tends to average out differences due to particular commodities handled.

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[84] See chart opposite p. 203, *infra*.

When consists are compared in terms of basic commodity groups, such as those used by the

Commission in the compilation of traffic statistics, much less difference is apparent between the territories than when the details of extreme examples are cited.

The following table from an exhibit submitted by the southern carriers (Ex. 16, R. 6180, 1785) and based on the Commission's freight commodity statistics for the year 1939, shows the percentage distribution of total tons carried and the percentage of revenue for each of the major commodity groups in each territory:

Percentage distribution of total tons carried and revenue by commodity groups

CLASS I RAILROADS 1939

	Official		Official (including Pocahontas)		Southern		Western	
	Percent of tonnage	Percent of revenue	Percent of tonnage	Percent of revenue	Percent of tonnage	Percent of revenue	Percent of tonnage	Percent of revenue
Group I: Products of agriculture	6.57	8.73	6.07	8.03	10.80	17.73	18.88	23.70
Group II: Animals and products	1.64	4.72	1.47	4.23	1.45	3.51	3.00	6.30
Group III: Products of mines	58.06	34.85	61.53	40.24	46.39	23.65	36.64	13.98
Group IV: Products of forests	2.43	2.74	2.43	2.69	11.40	9.45	10.59	9.31
Group V: Manufactures and miscellaneous	29.57	41.41	26.89	37.75	27.21	34.66	29.38	39.94
Total all carload traffic	98.27	92.45	98.39	92.94	97.25	89.00	98.49	93.23
All less-carload traffic	1.73	7.55	1.61	7.06	2.75	11.00	1.51	6.77

It will be noted from this table that there is little difference between territories in the relative amount of high rated Manufactures and Miscellaneous traffic carried. The cost and revenue comparisons show that in all territories such traffic generally moves at relatively high rates, i. e., rates which, ton-mile for ton-mile, make a substantially greater than average contribution to the constant costs or burden (Ex. 195, R. 11403, 4352). The percentages of the total tons carried accounted for by Manufactures and Miscellaneous are: East, 29.57; East including Pocahontas, 26.89; South, 27.21; and West, 29.38. These figures are very similar. The corresponding percentages for revenue also differ but little: East, 41.41; East including Pocahontas, 37.75; South, 34.66; and West, 39.94.

The three principal remaining groups, Products of Agriculture, Products of Mines, and Products of Forests, can be broadly characterized as traffic which moves at relatively low rates and in substantial volume. By "low rates" it is meant that the traffic moves at rates which, ton-mile for ton-mile, yield a less than average contribution to the constant costs or burden (R. 11403). These three groups combined account for the following percentages of total tons carried: East, 67.06; East including Pocahontas, 70.03; South, 68.59; and West, 66.11. These figures differ but little, as is also true of the revenues: East, 46.32 per cent; East, including Pocahontas, 50.96 per cent; South, 50.83 per cent; and West, 46.99 per cent. The similarity in the distribution of the tons and revenue figures by rate territories indicates that, despite some differences in the distribution of the traffic by individual commodity classes, the revenue-producing qualities of this traffic in each territory, relative to the revenue-producing qualities of the total traffic in each territory, are very similar. This is demonstrated by the fact that the percentages of the total traffic which fall under the general grouping of Products of Agriculture, Products of Mines, and Products of Forests, are not only very similar in the East, South, and West, but they yield about the same percentages of the total revenues in each of these territories.

Animals and Products, the remaining group, is quite small, and accounted for the following percentages of tons: East, 1.64 per cent; East, including Pocahontas, 1.47 per cent; South, 1.45 per cent; and West, 3.00 per cent. The corresponding revenue figures are: East, 4.72 per cent; East, including Pocahontas, 4.23 per cent; South 3.51 per cent; and West, 6.30 per cent. The less-carload traffic constituted another small and rather uniform share in percentages of the tons in each territory, namely: East, 1.73; East, including Pocahontas, 1.61; South, 2.75; and West, 1.51. The percentages of total revenue accounted for by the less-carload traffic, while higher, are nevertheless in close relation to the tons carried, namely: East, 7.55; East, including Pocahontas, 7.06; South, 11.00; and West, 6.77.

To sum up, the distribution of the traffic as between that which moves at relatively high rates, principally Manufactures and Miscellaneous, and that which moves in large volume at relatively low rates, is not greatly different in the various rate territories.

The table below, indicating that territorial consists do not differ too much from each other, is based on tons carried in each territory. Tons carried as reported by each railroad for the Commission's freight commodity statistics, however, necessarily contain some duplications. A study of the distribution of carload traffic based on revenue ton-miles for the year 1939 shows the following results, which substantiate the showing of the preceding table (Ex. 195, R. 11375–82):

Distribution of carload traffic based on revenue net ton miles, percent

Item	Official	Official (including Pocahontas)	Southern	Western
Products of agriculture	10.7	9.0	15.8	27.1
Animals and animal products	3.8	3.1	2.2	4.6
Products of mines	49.3	57.5	40.8	20.4
Products of forests	3.1	2.8	11.6	13.8
Manufactures and miscellaneous	33.1	27.6	29.6	34.1
Grand total, carload	100.0	100.0	100.0	100.0

Following the same grouping for comparison, i. e., the high rated Manufactures and Miscellaneous against the combined three other most important groups, this table yields the following figures of percentages of the ton-miles of carload traffic: East, 33.1; East, including Pocahontas, 27.6; South, 29.6; and West 34.1. The corresponding figures for Products of Agriculture, Products of Mines, and Products of Forests, combined, were: East, 63.1; East, including Pocahontas, 69.3; South, 68.2; and West, 61.3.

The groupings of products in the foregoing comparisons follow the logical method of comparing low-rated traffic—which obviously includes products of mines—with the high-rated Manufactures and Miscellaneous traffic. The groupings submitted by the appellants in No. 345 lump the low-rated products of mines with the high-rated Manufactures and Miscellaneous, and then compare these two groups with the remaining groups. No rational basis appears for these groupings.

As to different densities of traffic in the East and West, appellants' argument is that since density in the East is approximately three times that of the West, one ton of freight in the West must carry costs which may be spread over three tons in the East. Obviously, their point must be confined to constant costs, as distinguished from direct or variable costs, which, by definition, vary with the volume of traffic. Also, the short answer to this whole argument is that whatever the effect of density is on costs, its effect is merged in the final costs figures, which show that higher terminal and other costs in the East act as a counterweight to the sparser traffic of the West. If density were controlling, there would have been no point in making the costs studies. The western carriers inconsistently accept and rely on the costs figures for the South, where the density is not much greater than in the West.[65] As shown above under the discussion of costs, if density merges in the final costs figures for the South, density can equally merge in the final costs figures for the West.

Appellants have also advanced the argument that where a commodity moves in greater volume in one territory than in another, it should be given a lower rate in the former than in the latter. However, when considered realistically, the bottom drops out of this argument, due to the fact that in such instances volume means nothing to the individual shipper, but only to the carrier, and then only from the standpoint of costs.

The consist problem then really resolves itself into one of providing adequate revenues for the carriers from the traffic which they transport, and the governing factor becomes the revenue-producing or rate-bearing characteristics of the commodities which compose the traffic of the several territories. The fact that some particular commodity, such as phosphate rock, for example, moves regularly in substantial volume in one territory while appearing only in small quantities in each of the others, means little or nothing if some other commodity or commodities with equal revenue-producing potentialities are available to take its place in the general rate structures of the other territories. When analyzed in this light, the differences found by the Commission in the consists and volumes of the traffic of the various territories are neither so substantial nor of such character as to justify the present differences in class rates, and the Commission made its findings accordingly.

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[65] *I. C. C. Statistics of Railways in the United States*, 1941.

In the matter of deciding whether consists are *materially* different, the Commission must have reasonable latitude within which to function. Territorial consists will never be identical. Therefore, the factor of expert judgment immediately presents itself, and becomes controlling. This is like the costs comparison problem of what year or years to figure with, and whether Pocahontas is to be figured with the East or not. These are necessarily technical questions for experts.

(E) *Equalizing the class rates of the territories is not dependent on equalizing the non-class rates*

One of the points most relied on by appellants is their claim that exception and commodity rates charged in the South and West are lower for the same freight than the rates in Official Territory, and that it is improper and discriminatory to raise class rates in Official Territory and to lower class rates in the South and West without, at the same time, bringing about some kind of an equalization of exception and commodity rates, which move the great bulk of the traffic in all territories. The answer to this point is twofold: There was no proof that the territorial commodity and exception rate levels in the South and West are lower; and second, the Commission has every right to proceed to cure one evil at a time.

This argument rests on the premise that exception and commodity rates are, on the whole, lower in the South and West than they are in Official Territory. Unless appellants can support this premise by the record before the Commission, the argument falls of its own weight. An examination of the record proves conclusively that appellants cannot sustain this burden.

Comparing freight revenue levels, which include all the traffic that actually moves, shows that the Southern level is 3 to 5% above the Eastern (Ex. 196, R. 11268-9), and the Western level around 16% higher. These differences, because of the small fraction of class rate traffic in the South and West, are necessarily due to higher commodity and exception rates in the South and West.

There was a substantial amount of evidence in the record on the exception and commodity rates applicable to particular commodities between particular points. For example, elaborate statistical evidence was introduced by appellants of rates on certain major commodities like phosphate rock, coal, brick, fertilizer, lime, and logs, in the South as compared with Official Territory, and similar commodities moving between particular points in the West, with a comparison of these rates with rates for the same articles in Official Territory. However, the Commission found, and the record supports the finding, that there was no evidence showing the *average* rate levels of non-class rates in any rate territory, and that there was nothing in the record to show that the particular commodities selected by appellants, were typical of all of the commodities moving in the territories involved, nor w[illegible]here any showing that there was not an equal or greater number of commodities moving on non-class rates which move at higher rates in the South and West than in Official Territory.[66]

In 1943, the Board of Investigation and Research, created by the Transportation Act of 1940, published a report on interterritorial freight rates, which was reproduced as House Document No. 303, 78th Cong., 1st Sess. This Board made an elaborate study of comparative intraterritorial rate levels within Official, Southern and Western territories, of commodity rates on certain important commodities. The general conclusion stated on page 148 of this report was as follows:

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[66] The contention advanced in No. 343 that the East will be burdened with a $15,000,000 a year rate increase, and that such an increase is wholly unwarranted when compared with the much smaller savings to shippers in the South and West, is more than counteracted by the contention advanced in No. 345, that the new rates in the West alone will cost the western carriers $16,000,000 a year. The savings to shippers in the South must, of course, be added to this western figure. (Brief, No. 343, p. 47; No. 345, p. 9.)

> The foregoing analysis of commodity rates on a limited number of commodities which move in whole or in part on commodity rates shows that on most of the commodities there are substantial regional differences in the levels, with higher rates in the South and West than in Eastern Territory.

The major commodities studied were brick and other clay products, cement, coke, cotton textiles, cottonseed oil, fertilizer, and fertilizer materials, fresh meat and packing-house products, lime, livestock, logs, lumber, plaster and plasterboard, pulpwood, road aggregates or road-building materials, salt, scrap iron, and sugar.

The major premise of appellants, that commodity rates are lower in the South and West, is thus without support in the record, and such evidence as there is in the record which bears on this point is the other way.

Even if appellants' premise were sound, this would not take away from the Commission the power to bring about a step by step alignment of all the rate levels on a national basis, starting with class rates, as the Commission has done in these proceedings, and reserving exception and commodity rates for later consideration.

In *United States* v. *Wabash R. Co.*, 321 U. S. 403, a similar contention was made and rejected by the Court. In that case, the Commission had issued an order that spotting charges for cars at the plant of the Staley Company should be continued, because to cancel these charges would violate Section 6 (7) of the Act as a departure from the published tariffs. It was contended that this order discriminated against the Staley Company because other similar plants were not obliged to pay similar charges. The Commission had, several years before, made a general order that this type of charge must be made in this kind of plant, and the Commission then proceeded, plant by plant, to decide which plants should be made subject to the order. The Court said (at 414):

> * * * The suppression of abuses resulting from violations of § 6 (7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12 (1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6 (7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all.

The *Wabash* case shows the propriety of the action of the Commission in starting with class rates,

and not attempting to tackle the other kinds of rates in the same proceeding. An examination of the record will show the magnitude of the problems involved in dealing with the class rates alone on a national basis. The Commission's approach to rate equalization on a national basis had, as a precedent, its approach to uniformity within the several rate territories, in which, as here, the Commission began with one territory, by attacking the chaos existing there~~, and~~ without trying to do more than to handle one territory at a time, and then moved on to the next territory, dealing in the separate territories, as it is dealing here, with the class rates alone. The same Supreme Court precedent, and the same principle, are equally applicable to the Commission's action in entering the 10 per cent interim rate order, which was a substantial step towards equalization, but did not attempt to bring about complete equalization, reserving that until the uniform classification could be developed.

The reason for proceeding step by step in each of these instances has been a practical one. The rate structure of the United States cannot be remade in a day, and if the principle on which the Commission is working, and the objective of uniformity for which it is striving, is a valid one, appellants in this case can hardly say that because the Commission has not done everything within its power at once, it cannot do anything.

(F) *Summary—Interterritorial rate problems are insoluble without uniformity of class ratings and rates*

On a physical basis the railroads of the United States have developed into a national system. Carloads of freight loaded at any point can be delivered to any other point where standard-gauge railroads exist without unloading and reloading en route. However, the uniformity that characterizes this mechanical service does not extend to freight rates, the price of the service. Charges for equal amounts of service—equal tonnage of the same product moving equal distances—vary widely from region to region and frequently vary within the same region.

It is unfortunate that the advance in technology that has long since succeeded in overcoming the physical barriers that originally prevented unification of railroad service has not been accompanied by a corresponding unity in freight-rate structures and freight classifications. The Commission has done a great deal in recent years to unify on a *regional* basis the freight-rate structures and classifications, that have grown in a haphazard manner, but national unification was dormant until this case. Until now the railroads in each of the five rate territories have been allowed to go their differing, respective ways in rate making, so that they developed widely divergent policies in regard to the systems of charges to be paid on the freight moving in their territories. Consequently, there exists a composite of regional rate structures that do not fit together properly, because of pronounced differences in both the level and scheme of the rates.

The result of this regionalized freight-rate structure is to restrict commerce and trade by hampering a national flow of traffic across these territorial boundary lines. It is natural for commerce to expand as civilization progresses, and as long as these barriers against a national flow of commerce remain, economic progress in the United States will be retarded.

The existence of these freight-rate barriers was recognized by the late Joseph B. Eastman in his first report to Congress as Federal Coordinator of Transportation. The report states:

> * * * An objectionable phase of the railroad situation for many years has been the maintenance of regional differences and distinctions, which are very imperfectly related to differences in costs and of territorial boundary lines ("Chinese walls") where rate systems and practices change. It has tended to provincialize the railroads and discourage national unity of action. It has been a prolific source of complaints to the Commission.[67]

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[67] Senate Document 119, 73rd Congress, p. 29 (1934).

To overcome this serious obstacle to a national flow of commerce, the basic rates—the class rates and the freight classification—should be established on a uniform basis. The absence of any recognized standard for making rates and classifications is a cause of disagreements among the different groups of shippers and carriers involved as to what a new basis should be. This places industry at a serious disadvantage in obtaining satisfactory rates to move its products. The customary procedure for obtaining suitable rates is for shippers to request the railroads to take voluntary action. When separate groups of carriers serving competing shippers are involved, there are often disagreement, prolonged negotiations, and failure (R. 2758, 4747, 4763) Such a prospect is extremely discouraging to shippers and potential shippers. Appeal to the Commission is an expensive process that often involves delay which many shippers cannot undergo. To avoid such delays, disputes, and expense there is pressing need for a definitely formulated policy of making rates that will satisfactorily bridge the present rate territory boundaries and encourage, rather than retard, a national flow of commerce.

There is no direct relation between the distribution of natural resources and the distribution of population in the United States. It happens that some of the areas richest in natural resources in the United States are sparsely populated. If the raw materials making up those natural resources are to be converted into finished products in that vicinity, allowing the area some economic benefit from their conversion, it will be necessary to transport considerable volumes of finished goods for long distances. Necessarily minerals are obtained where the deposits occur, and agricultural products must be produced in areas of suitable soil and climate. It is the task of the transportation system to carry commodities from points of production to consuming centers throughout the United States and to the ports for export. The more freely and cheaply the products are carried, the more competition there will be, the more production there will be, and the better will our transportation system serve our national economy.

The maintenance of a sound national economy requires the proper use of natural resources to insure reasonable economic opportunity of a stable nature for the people in each of the regions of the country. As indicated, population distribution is not in accord with the distribution of natural resources, and it would require many years for people to move to where these resources are, assuming it possible to induce such millions to migrate, or that it would be wise policy to do so even if possible. There are also areas of one-crop agriculture in which the people face readjustments to restore and protect the land and to obtain additional sources of livelihood.

In view of all this, one of the basic principles in making freight rates should be the elimination of rate barriers against regional development, not to change our economy, but to remove discriminatory conditions which unfairly and unlawfully prevent the possibility of change. Discriminatory or preferential rates favoring some regions or territories will certainly operate to hinder economic development necessary for the national welfare.

The existence of a number of intraterritorial rate structures, with their sub-territories, differing in level and plan, does not conform to the basic principle enunciated above. Makeshift efforts have been made to blend adjacent intraterritorial structures, but they never satisfactorily overcame the sharp breaks that create rate barriers. The most important aspect of the situation comes about through one region having the heavy concentration of population and also the lowest level of rates in the United States, ~~applies~~ as well as the most favorable classification ratings.

This Official Territory has approximately half of the population of the United States. Many of the products of the South and West must eventually find a market, if they are to be sold at all, in the rich markets of Official Territory. Not only do manufactured goods moving within Official Territory have the lowest relative levels of class rates; the Official Territory producer also has available to him a lower level of class rates from Official Territory to the South and West than is available to the shippers using the class rates applicable within the Southern and Western rate territories.

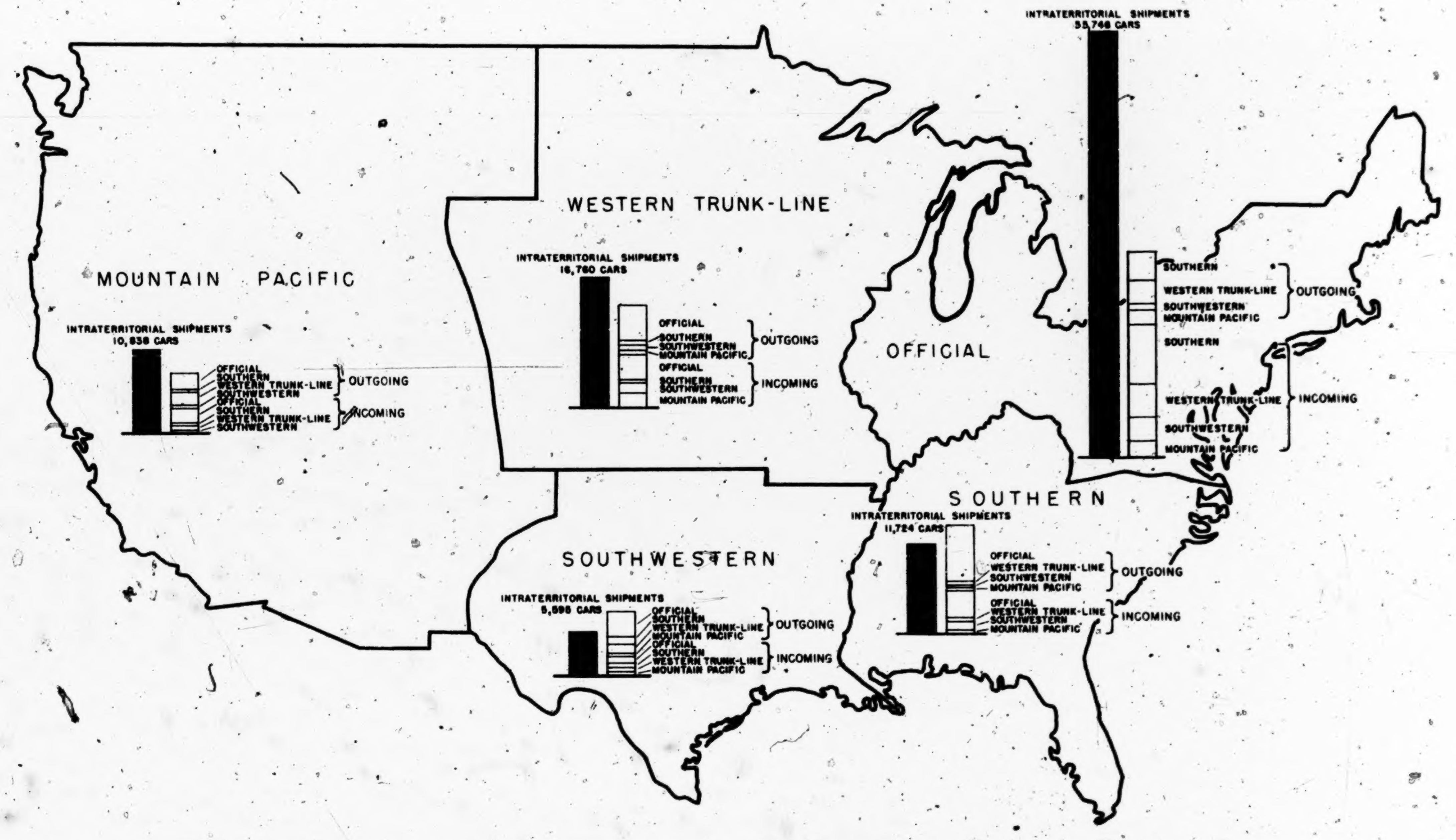
Manufactured articles from the South and West, when moved to Official Territory, generally meet competition from producers of similar articles located within Official Territory who can reach the same markets on Official intraterritorial rates that are substantially lower, mile for mile, than the interterritorial rates which the southern and western shipper must pay. An attempt to meet such competition generally results in a deduction from the price received for the product by the producer of the South or West because of greater freight-rate charges paid. This difference must either be absorbed by the southern or western manufacturer, resulting in a reduction in his profit, or be passed on in the form of lower wages to his employees or a lower price for the raw materials used in the product. These differences in freight rates, when expressed in terms of net profit, are frequently substantial, and may mean the difference between a profitable and a non-profitable business venture.

Thus, manufacturing in the South and West is discouraged and impeded, despite the fact that with the exception of nearness to markets, all the economic factors for industrial development are present in these regions.

The consumer has a definite interest in this situation. Free competition, which is the foundation of the American economic system, insures the consumer better goods at lower prices. When the freight-rate structure hinders or prevents the free flow of traffic, there is a lessening of competition, which means higher prices to consumers.

The preceding sections have shown in detail the relative disadvantages borne by the South and West in paying higher levels of class rates than prevail in Official Territory. The relative levels of rates have been contrasted by comparison of the prevailing first-class rate scales, by weighted aggregates of class rates, and by actual rates paid by, or available to, individual shippers. In each instance the substantial disadvantage suffered by the shippers in the South and West has been demonstrated.

Official Territory specializes in manufacturing, trade, and services, while the South and West are much more dependent on agricultural products and other raw and simple materials (R. 2360). Regional production has fallen into the pattern of a mother country and her colonial dependencies, with Official Territory, the center of industry and


INTRATERRITORIAL SHIPMENTS
55,748 CARS
WESTERN TRUNK-LINE
INTRATERRITORIAL SHIPMENTS
16,760 CARS
OFFICIAL
SOUTHERN
SOUTHWESTERN
MOUNTAIN PACIFIC
OUTGOING
OFFICIAL
SOUTHERN
SOUTHWESTERN
MOUNTAIN PACIFIC
INCOMING
MOUNTAIN PACIFIC
INTRATERRITORIAL SHIPMENTS
10,838 CARS
OFFICIAL
SOUTHERN
WESTERN TRUNK-LINE
SOUTHWESTERN
OUTGOING
OFFICIAL
SOUTHERN
WESTERN TRUNK-LINE
SOUTHWESTERN
INCOMING
OFFICIAL
SOUTHERN
WESTERN TRUNK-LINE
SOUTHWESTERN
MOUNTAIN PACIFIC
OUTGOING
SOUTHERN
WESTERN TRUNK-LINE
SOUTHWESTERN
MOUNTAIN PACIFIC
INCOMING
SOUTHERN
INTRATERRITORIAL SHIPMENTS
11,724 CARS
OFFICIAL
WESTERN TRUNK-LINE
SOUTHWESTERN
MOUNTAIN PACIFIC
OUTGOING
OFFICIAL
WESTERN TRUNK-LINE
SOUTHWESTERN
MOUNTAIN PACIFIC
INCOMING
SOUTHWESTERN
INTRATERRITORIAL SHIPMENTS
5,595 CARS
OFFICIAL
SOUTHERN
WESTERN TRUNK-LINE
MOUNTAIN PACIFIC
OUTGOING
OFFICIAL
SOUTHERN
WESTERN TRUNK-LINE
MOUNTAIN PACIFIC
INCOMING

REPRESENTATIVE INTRA-& INTERTERRITORIAL MOVEMENTS OF REVENUE FREIGHT CARS

SOURCE: WAYBILLS SUBMITTED BY RAILROADS TO O.D.T. ON CARLOAD FREIGHT ORIGINATING SEPTEMBER 23, 1942

RUST DIVISION — GRAPHIC PRESENTATION SECTION trade, obtaining large quantities of raw materials, adding to their values, and selling them back as high-valued manufactures (R. 2366).

Measure of the amounts of freight traffic moving within and between rate territories is of great importance in indicating the value of uniformity in class rates and freight classification. The chart opposite this page is based on the table following this paragraph. The data show that interterritorial commerce is more vital to the other rate territories than it is to Official Territory because the great preponderance of business in that Territory is *intra*territorial, indicating the great diversification in Official Territory of economic activity (Ex. 228, R. 11834–5).

Distribution of carload freight traffic, September 23, 1942

[Number of carloads]

Origin territory	Totals originated	Destination territory				
		Official	Southern	Western Trunk-Line	Southwestern	Mountain Pacific
Official	65, 269	55, 746	3, 517	3, 191	787	2, 028
Southern	20, 472	7, 518	11, 724	412	551	267
Western Trunk-Line	23, 130	4, 410	611	16, 760	742	607
Southwestern	11, 482	3, 169	1, 115	1, 324	5, 595	279
Mountain Pacific	15, 394	2, 115	267	1, 846	328	10, 838
Totals terminated	135, 747	72, 958	17, 234	23, 535	8, 003	14, 019
	Percentage distribution					
Official	48. 08	41. 07	2. 59	2. 35	. 58	1. 49
Southern	15. 08	5. 54	8. 64	. 30	. 40	. 20
Western Trunk-Line	17. 04	3. 25	. 45	12. 34	. 55	. 46
Southwestern	8. 46	2. 33	. 82	. 98	4. 12	. 21
Mountain Pacific	11. 34	1. 56	. 20	1. 36	. 24	7. 98
Totals terminated	100. 00	53. 75	12. 70	17. 33	5. 89	10. 33

This chart and table illustrate not only the extent of the economic attraction Official Territory exerts on the other rate territories, but also the relatively small amount of traffic shipped among the territories.

Obviously, the low income status of the South and West may be improved by removing the barriers to industrialization in those regions, and allowing industry to develop in a manner commensurate with the natural and human resources present there. The products of such industrialization must not be barred from the rich markets of Official Territory by territorial rate discriminations outlawed by Congress.

It has been emphasized that Official Territory shippers can come into other territories on lower levels of class rates, mile for mile, than shippers residing in those territories have to pay for shipping similar articles wholly within their own territories. One has here something remarkably similar to the working of a protective tariff, to the extent that certain favored interests effectively strive to protect themselves at home while retaining privileges elsewhere (R. 2799, 2800, 4752).

It is significant that neither the Official nor the Southern Territory railroads are parties to this proceeding. Having presented their case to the Commission, they are apparently willing to abide by the Commission's decision for uniform freight classification and class rate levels in the territory east of the Rocky Mountains. They have filed their tariffs to effectuate the new interim rates ordered by the Commission and, at least as far as the Southern railroads are concerned, have given no indication to this Court that they are complaining about the new rates.

In *State of Georgia* v. *The Pennsylvania R. Co.*, 324 U. S. 439, 450, this Court said:

> * * * Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets.

Uniform class rates and freight classification will do much to remedy the effects of discriminatory rates referred to by the Supreme Court. The Commission has so found, the court below has adopted those findings, and we submit this Court should find that the action of those two tribunals was not error.

III. THE COMMISSION'S ORDER WAS BASED ON ADEQUATE PRELIMINARY FINDINGS

Scattered through appellants' briefs are numerous assertions that the order of the Commission is not supported by requisite preliminary findings. There is no unanimity among appellants about the specific findings which they say are a legal necessity and are absent. Appellants approach fundamental questions, like findings as to the compensatory character of the new rates, from wholly different points of view, appellants in No. 343 arguing that the new class rates are far too high, while appellants in No. 345 argue that they are far too low. Appellants in No. 345 seem to consider confiscation in less-carload rates as the backbone of their case, whereas appellants in No. 343 call the less-carload traffic "of minor importance" (Brief, p. 59). Appellees have, in spite of this confusion and these conflicts, made an effort to determine, from careful examination of appellants' briefs, just what preliminary findings are asserted by one or more of appellants to be necessary and lacking.

The preliminary finding on which all appellants seem to lay most stress, as necessary and lacking, is a finding, as a prerequisite to that part of the order increasing rates in Official Territory, that the class rates in Official Territory are noncompensatory, or threaten to become noncompensatory through a rate war, and burden other traffic. There are three separate sufficient answers to this contention.

If two sets of rates are discriminatory, in violation of Section 3 (1) of the Interstate Commerce Act (and the Commission so found in this case), the question of whether they are compensatory or not is irrelevant. In *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671, the Court, after referring to the zone of reasonableness, said, in effect, that while rates may lie within that zone, nevertheless they may result in undue prejudice and discrimination. The zone of reasonableness does not purport to be a zone of nondiscrimination, and at least some of the appellants seem to concede this fact (Brief, No. 343, p. 40). All rate structures must yield for the correction of a discrimination found to exist.

A second answer to appellants' contention is that the Commission found the class rates in Official Territory to be unreasonably low from a rate-of-return standpoint, when returns in this territory were compared with returns in other territories (*supra,* p. 175).

A third answer is that the Interstate Commerce Act does not, by its terms, require a finding that existing rates are noncompensatory, as a necessary prerequisite to a minimum rate order, and to require such a finding would in effect, be to substitute a new criterion for the criterion of "reasonableness" prescribed by the Interstate Commerce Act. The Commission has specifically found the existing class rates in Official Territory "unreasonable" in violation of Section 1 of the Act, as well as discriminatory in violation of Section 3. In *Scandrett* v. *United States,* 32 F. Supp. 995, affirmed 312 U. S. 661, it was held that rates which are compensatory are not necessarily just and reasonable, and that other factors may be decisive. The Commission had found the rates involved in that case to be "compensatory, considering all costs," and the Commission's order raising these rates was upheld. See also *Jefferson Island Salt Mining Co.* v. *United States*, 6 F. 2d 315.

Another preliminary finding stressed by appellants as necessary and lacking is a finding that present class rate differentials are not justified by actual transportation conditions, or, as put by appellants in No. 345, that there are substantially similar costs, consists, density of traffic, and other conditions affecting rates under traditional standards. It is hard to understand how anyone could read the report of the Commission and assert that these findings are absent. The elaborate analysis by the Commission of costs, consists, density of traffic, and other conditions has been expounded in considerable detail in point II of this brief, and the findings that there are no substantial differences in these conditions which would warrant the existing class rate differentials, are spelled out for anyone to read in the report, being summed up at R. 302-15. Not only are these preliminary findings not lacking; they are the cornerstone of the Commission's order.

A third preliminary finding asserted to be necessary and lacking, especially by appellants in

Nos. 343 and 344, is a finding that the differences in classifications and rate levels resulted in actual differences in the going rates, which cause injury in concrete situations. This ground has been covered in section II of this brief, particularly at pages 98 to 127.

Another preliminary finding urged as necessary is a finding that the new higher rates in Official Territory are in compliance with the lowest cost mandate of Section 15a of the Interstate Commerce Act. Appellants seem to forget that Section 15a requires the Commission to give due consideration, "among other factors," to the need of adequate and efficient railway transportation service "at the lowest cost *consistent with the furnishing of such services; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such service.*"

Finally, it is insisted by appellants that the Commission cannot prescribe rates, based on a finding of discrimination, without a preliminary finding that it would be impossible to allow the carriers alternative methods for the removal of the discrimination, and that in any event there can be no prohibited discrimination unless it is found that all of the carriers involved in it are under common control. These legal points will be discussed in detail in a later section of this brief, as will all of the statutes under which the Commission was acting.

From a reading of appellants' briefs, one might get the impression that anyone attacking a rate order of the Commission need only contrive to spell out a series of elaborate preliminary findings which he conceives as necessary prerequisites to support the order of the Commission under attack, and that if he can then demonstrate that any one of these findings has not been expressly made by the Commission, the order must be declared invalid. Obviously this is not the law, and obviously the Commission has a wide discretion in making and phrasing its preliminary findings.

In *Pennsylvania R. Co.* v. *United States,* 323 U. S. 588, it was charged that the Commission had failed to make proper subsidiary findings. The Court disposed of the contention with the following words (p. 593):

> The appellants contend that even if the Commission was right in its interpretation of its statutory authority, its over-all conclusion is not supported by evidence or by the subsidiary findings. The claim is that the Commission did not make findings that the expense and inconvenience to the carriers concerned of rendering services over routes involving four, five, or six railroads, with the consequent interchange of traffic, would not be inordinately expensive and burdensome, and they point to certain evidence offered before the Commission which they say the Commission ignored. In the court below the same contention was con-

sidered and overruled. True, the Commission's findings are not sharp and clear on the point, but the matter was not ignored and the Commission's decision refers to it. We are unable to say that there was not sufficient in the record before the Commission, and in its findings, to justify the conclusion that the Commission, as it says it did, weighed the evidence and found that the balance was in favor of the order made.

A very recent pronouncement by this Court on the subject is contained in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, in which the Court said that, given the essential findings, "the Commission is not compelled to annotate to each finding the evidence supporting it." This same case, incidentally, also disposes of the contention that the war has made the Commission's order so stale that there was an abuse of discretion in not granting a rehearing in 1945. The Court, after again stating that *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, the case so strongly relied on by appellants, "stands virtually alone," goes on to say (327 U. S. at 535):

> * * * The Commission was well acquainted with the impact of the war upon facilities for transport and upon the transportation business in general. In addition to its own expert knowledge concerning such matters, it had before it not only the

facts set forth in the petition for rehearing but also those alleged in the extended replies filed by the applicants.

In the *Pierce Auto Freight Lines* case, the proceedings had been closed in October of 1940. The orders became effective in September, 1943. The three-judge court's "view was that the record was so stale, particularly in view of the influence of the war upon transportation facilities, that application of the doctrine of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, was proper." This Court felt otherwise. See also *Interstate Commerce Commission* v. *City of Jersey City,* 322 U. S. 503.

IV. THE SCOPE OF JUDICIAL REVIEW IN THIS TECHNICAL AND COMPLEX RATE ADJUSTMENT IS NARROW AND LIMITED

That judicial review of orders of the Commission, as here invoked, is narrow and closely circumscribed, is both well settled and eminently sound:

> To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the findings of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. [*Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663.]

The doctrine of administrative finality (*Rochester Telephone Corp.* v. *United States,* 307 U. S. 125) is especially applicable to rate cases, the technical complexity of which by its very nature prohibits judicial inquiry on the merits:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. *Cf. Railroad Commission* v. *Rowan & Nichols Oil Co.,* 310 U. S. 573, 581–82.
>
> The wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process is strikingly vindicated by the history of this controversy. * * * There was no ready answer either in law reports or in economic experience. Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body. In this perspective, the Commission had several choices before it—but all inevitably rested upon trial and error. * * * Of only one thing could the Commission be completely certain: no action could be taken without "adversely affecting certain of the conflicting interests."

> 164 I. C. C. 619, 698. * * * That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants. [*Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546-548.]

Some economic problems are so difficult of solution that it is unfortunate that they have to be decided at all. However, when presented, some solution must be found, even though it may not be, or be claimed to be, the only possible solution; and where a rate problem of this kind is presented, both Congress and this Court have left no doubt that it is the Commission, and not the courts, which must make the decision and have the last say under the doctrine of administrative finality, subject only to those few well-defined and closely restricted lines of inquiry which the reviewing court may make:

> * * * "the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission v. Hope Natural Gas Co.,* 320 U. S. 591, 602. The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad: "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive." *Interstate Commerce Commission v. Union Pacific R. Co.,* 222 U. S. 541, 550. [*Interstate Commerce Commission v. City of Jersey City,* 322 U. S. 503, 512–513.]

V. THE AUTHORITY OF THE COMMISSION WAS EXERCISED IN STRICT COMPLIANCE WITH STATUTORY PROCEDURE

(A) *The statutes involved*

The proceedings here attacked were instituted by the commission on its own motion, as Section 15 (1) of the Interstate Commerce Act expressly authorizes. In these proceedings, the Commission inquired into two kinds of unlawfulness—unreasonableness and discrimination. The unlawfulness inquired into concerned classifications, and also class rates, each from the standpoint both of unreasonableness and discrimination. The jurisdiction of the Commission to inquire into unreasonableness of classifications and rates is defined in Section 1 of the Interstate Commerce Act, and its jurisdiction to inquire into discrimination is defined in Section 3 of the Act.

Section 1. Section 1(5)(a) is the major substantive section dealing with unreasonableness of rates. It provides that "all charges made for any service rendered * * * shall be just and reasonable", and it prohibits "every unjust and unreasonable charge."

Section 1(6) imposes the same obligations and prohibitions, with respect to classifications, which are imposed by Section 1(5)(a) in connection with rates. Section 1(6) makes it the duty of the carriers to establish and enforce "just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are * * * made", and it prohibits "every unjust and unreasonable classification, regulation and practice."

Section 1 (4), the only other subdivision of Section 1 of the Act which is relevant and under which the Commission purported to act, merely extends the provisions of the other two subsections to *through* rates and classifications.

The Commission found, in its inquiry under Section 1, that existing rates and classifications both were unreasonable within the meaning of this section.

Section 3. Section 3 (1) of the Act deals with discrimination. It mentions neither rates nor classifications, but its language is so broad that it obviously includes both. It prohibits "any undue or unreasonable preference or advantage * * * or * * * undue or unreasonable prejudice or disadvantage in any respect whatsoever" to persons, places, or kinds of traffic. The sweeping character of the prohibitions of Section 3 (1) has been emphasized by this Court many times, as in *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 749–750:

> The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong., 1st Sess., p. 215. See *Kansas City S. R. Co.* v. *C. H. Albers Commission Co.,* 223 U. S. 573, 597 [56 L. Ed 556, 568, 32 S. Ct. 316]. This Court has said that the

language of the Act "is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn." *The Shreveport Case* [*Houston, E. & W. T. R. Co.* v. *United States*], 234 U. S. 342, 356.

Section 15. Having found classifications and class rates unlawful under Sections 1 and 3 of the Act, the Commission was authorized to act under Section 15 to remove the unlawfulness.

Section 15 (1) provides that upon a finding by the Commission of unlawfulness of rates or classifications under Section 1 or Section 3, "the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable rates, * * * maximum or minimum, or maximum and minimum, * * * and classification," and it prohibits noncompliance with the rates and classifications so prescribed.

Section 15 (3) extends these provisions to through and joint rates and classifications.

In *United States* v. *Chicago, Milwaukee, St. Paul, & Pacific R. Co.*, 294 U. S. 499, the Court said (at 505, 509–510):

> Section 15 * * * is to the effect that the Commission shall have power to determine the just and reasonable rate when a rate in force or proposed is found to be unjust or unreasonable or unduly discriminatory or otherwise unlawful. * * *

> Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly. *Florida* v. *United States*, 292 U. S. 1; *United States* v. *Louisiana*, 290 U. S. 70.

An indication of the broad power of the Commission to prescribe rates is contained in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 353:

> The particular problem here involved is but a segment of the larger complicated national problem of rates with which the Commission must deal.

The Commission has always been regarded as "being more of an administrative than a judicial tribunal." *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314. However, in prescribing rates, it rises to the elevation of a legislative body, with all the presumptions of validity attaching to the rates it makes which would attach to the laws which other legislative bodies make. As stated by the court in *Terminal R. Assn.* v. *United States*, 266 U. S. 17, 30–31, "The making of rates under Section 15 (1) is a legislative and not a judicial function."

The only other statutory provision directly involved in this case and dealing with the authority of the Commission, which was in effect when these proceedings were instituted, is Section 15a, the rule of rate making, which calls on the Commission to give due consideration in the making of rates to a few specified factors "among other factors." One factor itemized in this section is "the effect of rates on the movement of traffic," a subject which is developed fully above, pp. 127–147, in demonstrating that the class rates which the Commission found unreasonable and discriminatory do not move *the traffic.*

Another section of the Interstate Commerce Act which may have some pertinence, although it is not directly involved and the Commission did not proceed under it, is Section 13, paragraphs (3) and (4), which outlaws discriminations as between intrastate commerce and interstate commerce, in language very similar to that of Section 15 (1). Section 13, paragraphs (3) and (4), like Section 15 (1), authorizes the Commission to prescribe "the" rates which will be free from the prohibited discrimination. The authority of the Commission to remove discriminations and prescribe new rates, where intrastate commerce is involved, was upheld and explained in *Georgia Public Service Commission* v. *United States,* 283 U. S. 765. That Congress intended by Section 15 (1) to give the Commission less power to correct discrimination in interstate rates than it gave the Commission by Section 13 (4) over intrastate rates seems hard to believe, although this apparently is a proposition seriously advanced by appellants.

The effect of the 1940 amendments to the Interstate Commerce Act has been discussed in detail in an earlier section of this brief. The purpose of the last few pages has been to direct the Court's attention to the underlying statutory provisions under which the Commission acted in this case. There follows an analysis of two legal questions raised by appellants, who are insisting that this Court has so interpreted the Interstate Commerce Act, and particularly Section 3 (1), as to read into that section two qualifying provisions which are not spelled out in the statute.

(B) *The Commission was not required to afford the carriers alternative methods of removing the discrimination*

Appellants' contention that the Commission erred in not giving the carriers a choice between alternative methods of removing the discriminations found by the Commission to exist rests on the following language of the Court in *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627, 650:

> A carrier or group of carriers must be the common source of the discrimination, must effectively participate in both rates, if an order for the correction of the disparity is to run against it or them. *Where an order is made under § 3 an alternative must be afforded.* The offender or offenders may abate the discrimination by

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> raising one rate, lowering the other or altering both. [Emphasis supplied.]

However, the Court, speaking through Mr. Justice Roberts, was careful to point out in the *Texas & Pacific* case that the rule there announced, and quoted above, does not apply to an order made under Section 15 (1) of the Act. The orders for the future here attacked were made under Section 15 (1). Footnote 39 to the opinion (p. 650), which immediately follows the statement quoted above, qualifies it in this way:

> This is not true of an order pursuant to § 15 (1), prescribing maximum or minimum or maximum and minimum rates, but the present orders were not issued under that section.

The Court thus clearly recognized in the *Texas & Pacific* case the simple distinction between an order made under Section 3 (1) and an order made under Section 15 (1). As already explained, Section 3 (1) makes unlawful any undue or unreasonable preference, advantage, prejudice, or disadvantage. When the Commission acts only under Section 3 (1), which gives the Commission no rate-making power, it necessarily limits its action to a finding that a discrimination exists, and an order that it be eliminated. Under those circumstances, the order is known as one made under Section 3, and an alternative must necessarily be afforded the carriers, for the Commission has not exercised its rate-making power under Section 15 (1) of the Act.

But when the proper bases exist for an order under Section 15 (1) and the Commission chooses to exercise the power thereby conferred upon it, the situation is entirely different. Section 15 (1) provides that whenever the Commission shall be of opinion that any rate or charge is "unjust or unreasonable *or* unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part," the rate or charge to apply in the future may be prescribed.

The Court will note that disjunctives were used. The words "unjust or unreasonable" clearly refer to the prohibitions of Section 1, whereas the words "unduly preferential or prejudicial" plainly refer to the evils which are condemned by Section 3 (1). A proper finding of unlawfulness under Section 3 (1) enables the Commission to prescribe for the future, i. e., not only to tell the carriers to remove the unlawfulness, but, in a proper case, to tell them how it must be done. Any other construction would negative the plain words of the statute.

That this Court, again speaking through Mr. Justice Roberts, clearly had in mind the distinction between a Section 3 order and a Section 15 order in the *Texas & Pacific* case, is shown by his opinion in *Youngstown Sheet & Tube Co. v. United States,* 295 U. S. 476. There the Court had under consideration an order prescribing rates for the future under Section 15 which had been issued by the Commission after it made a finding of undue discrimination in violation of Section 3 (1). The Court said (295 U. S. at 480):

> There is no merit in the contention that the order was a § 3 order and invalid for failure to afford the carriers an alternative of raising the contested rate or lowering others to remove discrimination. It is true the Commission found prejudice to shippers all rail, but in essence the order was a § 15 order and not one made under § 3.

In the *Youngstown* case, the Court cited with approval its earlier decision in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136. Because the opinion in that case emphasizes the distinction between Section 3 orders and Section 15 orders, a quotation may be helpful (245 U. S. at 145):

> Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The order here complained of gives the carriers

no such option. It directs that the rates to Paducah shall be "not in excess of the rates at present in effect from the same points or groups to Cairo, Ill." In other words, the Commission, having found the 22-cent rate unduly high, reduces it to 16 cents, by establishing joint through rates. The injury resulting from discrimination was doubtless the reason which induced the Paducah Board of Trade to institute the proceedings; and the Commission may have considered the existence of the lower rate to Cairo persuasive evidence that the 22-cent rate to Paducah was unreasonably high and the resulting discrimination strong reason for establishing the 16-cent joint rate. But the order is strictly one under § 15 of the Act to Regulate Commerce to reduce existing through rates or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of § 3.

It is submitted that the contention that an alternative must be afforded under the facts in this case is without merit. An alternative must be afforded when the order is made under Section 3, solely because the function of the Commission is limited in such a situation to finding an undue preference, and ordering it removed. Before one can remove discrimination, who has been ordered to do so, he must have the power to remove it. Hence the rule applicable to Section 3 orders, that an alternative must be afforded. But when the order is made under Section 15, the situation is different. The coercive legislative power of government is applied. The reason for the alternative remedy rule no longer exists.

The discussion immediately below supplies additional reasons why the alternative remedy argument is without merit.

(C) *All the rates found to be discriminatory were controlled by the same carrier group, but the rates would be valid even if this were not so*

The passage quoted from the *Texas & Pacific* case, *supra* (pp. 221–222), also provides the basis for appellant's contention that rates cannot be found discriminatory unless they are controlled by the same carrier or group. This point and the previous one are so interrelated that our answering arguments (pp. 222–233 hereof) are to a considerable extent applicable to both.

The Commission here found that the relation between the class rates from Southern, Southwestern, and Western Trunk-Line territories to Official Territory, on the one hand, and the class rates applicable within Official Territory, on the other, was unlawful because in violation of Section 3 (1) of the Act. The carriers in Official Territory control the rates within Official Territory, and also control, jointly with the carriers in each of the other territories, the rates from each other territory into Official.

It is not necessary that a carrier's rails reach the point subjected to prejudice before it is guilty of violating Section 3 (1). That precise point was presented to the Court in *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144, where the Court stated:

> Carriers insist also that the order is void on the ground that, since their "rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.*

In *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States,* 270 U. S. 287, three steam railroads were ordered to stop discriminating against an electric carrier by refusing to interchange traffic with it through a fourth steam railroad, which was intermediate to the electric road and the other three, and with which the other three were interchanging traffic. The Court stated that the fact the three carriers alone could not remove the discrimination and that the consent of the connecting carrier, which was not discriminating, was necessary to remove it, did not invalidate the order. The Court said (270 U. S. at 293):

> * * * Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury.

Although the rule of the *Texas & Pacific* case, *supra,* has probably been sufficiently clarified by the cases just discussed, so that appellants' arguments based on that case are met, there is another explanation of the *Texas & Pacific* case which distinguishes it from the instant case.

If a discrimination is found to exist in the relationship of two rates, the Commission has power to correct this discrimination under Section 15 (1) by fixing new reasonable rates, whether the old discriminatory rates were reasonable or unreasonable. However, to act under Section 15 (1), the Commission must make an express finding that the new rates it fixes are reasonable, and in order to make such finding, the Commission must have before it evidence on the question of reasonableness. Without such evidence on the subject of reasonableness, it can be argued that all the Commission could do to correct the discrimination would be to order the carriers to correct it.

The majority of the Court in the *Texas & Pacific* case seemed to assume that there was no evidence before the Commission on the subject of the reasonableness of any of the rates in question, and from this assumption, the Court reasoned that the Commission had no power to make new rates under Section 15 (1).[68] If the *Texas & Pacific* case is thus regarded as a case in which evidence on the subject of reasonableness was wholly lacking, it is clearly distinguishable from the case at bar, in which the Commission had a great deal of evidence before it on the subject of reasonableness, upon which evidence it based its specific findings that the old rates were unreasonable and the new rates reasonable. In any event, in the *Texas & Pacific* case the majority of the Court stated that "the parties agree that authority for the order must be found in § 3 (1)" (289 U. S. at 633). This last statement would seem to have the effect of stipulating away the validity of the Commission's rate-making order, since the Commission has no rate-making power, in the sense of fixing specific new rates, under Section 3 (1).

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[68] "the assertion of unreasonableness was withdrawn and the Commission made no finding that the Galveston rates were unreasonable * * *. There was therefore no basis for an order fixing minimum reasonable rates under § 15 (1) of the Act" (289 U. S. at 633).

Finally, serious doubts are cast on the validity of the reasoning in the *Texas & Pacific* case by the dissenting opinion of Mr. Justice Stone, concurred in by Chief Justice Hughes, Mr. Justice Brandeis and Mr. Justice Cardozo, in which sharp issue is taken with the majority on the issues of the necessity of alternative remedies and a common source of the discrimination. Mr. Justice Stone stated (289 U. S. at 668–669):

> But the statute does not compel the Commission to afford such an alternative or permit an offending carrier to avoid its salutary provisions merely for the reason that, although participating in both the offending rates, it can with certainty control only one. It is true that in cases arising before the enactment of Transportation Act, 1920, by which power was given to the Commission to fix a minimum rate, it could not remove a discrimination by prescribing a minimum rate to one of the competing localities. But it could remove the discrimination by imposing a lower maximum rate, even though a joint rate participated in by the carrier whose rails did not reach the locality discriminated against, (compare *St. Louis Southwestern Ry. Co.* v. *United States, supra*) or, as already mentioned, it could leave the carriers free to remove the discrimination by raising one or lowering the other. See *American Ex-*

> *press Co.* v. *Caldwell, supra,* 624; *United States* v. *Pennsylvania R. Co.,* 266 U. S. 191. And now that the Commission has power under § 15 (1) to fix a minimum rate it may equally command the removal of the discrimination by directing a rate to be raised, just as where the carrier maintains discriminatory practices the Commission may direct the modification of one and not the other, and is not bound to allow the carrier a choice. * * *.
>
> The situation here appears to be identical with that presented to this Court in *United States* v. *Illinois Central R. Co., supra,* and in *St. Louis Southwestern Ry. Co.* v. *United States, supra.* In both cases the carriers' rails reached one of the competing points only through its connections. In the first the order leaving the carrier free to remove the discrimination by raising one rate or lowering the other, and in the second an order requiring the carrier to remove the discrimination by establishing a lower joint rate with its connections, was upheld by this Court. * * *

Of course, all of these cases cited above were decided before the 1940 amendment of Section 3 (1). The effect of that amendment on the question of whether there can be a discrimination between territories, not involving the same groups of carriers, which the Commission is, by the amendment, given power to correct, even though neither carrier is by itself guilty of an unlawful discrimination, has not been before this Court, and is not before the Court in this case, inasmuch as all the rates found discriminatory were controlled by the Official carriers. There is, however, a strong argument in favor of the existence of such power. The different rate territories almost by definition contain separate groups of carriers. If a Missouri shipper, competing in the Twin Cities with an Illinois shipper, must pay freight on the Western scale in order to go up the west bank of the Mississippi River to Minneapolis, and suffer a 50 percent higher freight rate than his competitor across the Mississippi River, who, using another carrier, is shipping on the Eastern rate basis to St. Paul, and the Commission is powerless to correct this discrimination, there is still a serious void in the Commission's power which was not corrected in 1940 by the addition of the word "territory" to Section 3 (1) of the Act. Even before 1940, this Court in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, said (at 509) that the Commission under Section 15 "may conduct a comprehensive inquiry into the rates of all the lines within the area in controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly." If the power of the Commission is so narrow that its hands are tied in protecting shippers from discrimination, unless both rates involved in the rate relationship are controlled by the same carriers, the Commission will find it is unable to build a rate structure from which discrimination between territories can fairly be said to be absent. Surely, this was not the intention of Congress in 1940. See pages 65–87, *supra.*

VI. THE NEW LESS-CARLOAD RATES IN THE WEST CANNOT BE REGARDED AS CONFISCATORY

(A) *The facts negative confiscation*

Appellants in No. 345 raise the only constitutional issue in the case by their allegation that the new less-carload class rates in the West are confiscatory, and in support of this allegation they introduced evidence in the court below, over the objection of appellees. The court below stated it did not have "sufficient confidence in that type of evidence to be satisfied that deficit carriage is required by the ad interim order" (R. 1427). Their confiscation case did not inspire confidence, because their evidence compared less-carload costs with *all* less-carload revenues, instead of only *class-rate* less-carload revenues, when these appellants are voluntarily maintaining their *non-class* less-carload rates at much lower levels than their less-carload class rates. In addition, in comparing the new rates with costs, appellants did not consider all, but only a small segment, of the new class rates, and those were the lowest ones. Further, appellants' figures are subject to so many infirmities that no court would be justified in setting aside an entire national rate structure on such an uncertain and unconvincing showing dealing, at most, with an incidental, minute segment of the rates.

By and large, the transportation of less-carload freight, which accounts for only a very small percentage of total railroad freight tonnage (1.3% in 1944),[69] is exclusively within the control of the carriers. Unlike carload freight, the carriers load it, handle it, and unload it, and it is within their power to make this service expensive to themselves (for example, by light loading of cars), or to keep their costs down to the minimum (for example, by heavy loading of cars). If rates should be made to compensate carriers for the most expensive way of handling less-carload traffic, the inevitable result would be to reward inefficiency and to penalize shippers unnecessarily. In delicately balancing these interests in rate making, the Commission's highest degree of expert judgment is called into play.

The revenues from less-carload traffic in the West, which the western carriers compare with less-carload costs in the West, were revenues from all less-carload traffic, including exception, commodity, and intrastate rate less-carload traffic, all of which admittedly are on a lower rate basis than class rate traffic. The carriers have reduced these rates voluntarily, or are maintaining them voluntarily, thus greatly reducing their revenues from less-carload traffic, a situation they have it wholly within their own control to remedy (p. 96, *supra*). Furthermore, the carriers always apparently have preferred to have a single rate scale applicable to both carload and less-carload traffic, and to make their differences in rates charged between these two classes of traffic in the form of *classification* differences. Since the carriers are now preparing the new uniform classification, they have it wholly within their own control to propose classification differences between carload and less-carload traffic, which will eliminate any grievances they claim to have about the noncompensatory character of less-carload rates in the West. In addition to these factors, the carriers have within their sole control the entire question of how expensive they want to make the less-carload service, through heavy or light loadings, speed of service, ratio of empty return cars, methods of loading freight so as to reduce damage claims, substitution of auxiliary truck service, etc. (see R. 910, 4565–71).

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[69] *I. C. C. Statistics of Railways in the United States*, 1944.

The tabulation set out at R. 1403–7 shows that even though the 1939 less-carload costs in the West had a ratio to revenues from all such traffic of 130 to 100, this ratio reverses itself to the point where, for the class-rate portion of the less-carload traffic, the out-of-pocket costs plus the solely related constant costs are only 81% of the revenues, when adjustments are made for (a) the increased revenues from the increased minimum charge per shipment from 55 to 75[70] cents, (b) the elimination of the less-carload traffic moving on exception, commodity, and intrastate rates, (c) a 10-ton load, and (d) the actual 2.47 percent rate of return of 1939, instead of the 4 percent rate used in the cost analysis.[71]

The highlight of the confiscation case of the western carriers seems to be the deficit tables contained in their brief, which purport to show that less-carload costs in the West are substantially higher than the third and fourth class rates on such traffic.

These tables, it should be noted, omit first and second-class traffic. They omit Zones II and III in the West, where the latter zone includes all of Southwestern Territory. The rates in these zones are much higher than the Zone I rates (see charts

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[70] Increased from 75 cents to $1.00 by *Ex parte* 162, decided December 5, 1946, which also created a new minimum rate of 50 cents per 100 pounds on pick-up and delivery traffic. No effect is given to these charges in these calculations.

[71] Even allowing for the full alleged 24% rise in prices, the revenues would still exceed the out-of-pocket plus the solely related constant costs. Solely related constant costs for less-carload traffic mean those costs which do not vary with the volume of less-carload traffic, i. e., which would continue whether one ton or one million tons of less-carload traffic were handled, but which could be eliminated if no less-carload traffic were handled. They include items like freight-loading platforms, etc. In their 24% adjustment, appellants improperly increased their rate of return figure 24% as well as their expense figures.

opposite p. 240, *infra*). They use a 14-cent allowance for average pick-up-and-delivery expense, disregarding the fact that this service is not performed for all traffic (R. 199). They ignore the fact that some less carload class rates under the interim order will not be reduced at all, and under the permanent adjustment will actually be raised.[72] They thus pick out a very small segment of the class rate traffic, a fraction even of the less-carload class rate traffic in the West, and try to inflate it and make it decisive of the validity of the entire order of the Commission.

Returning to the western carriers' deficit tables, these tables reflect both the out-of-pocket costs

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[72] An illustration of how the permanent adjustment rate scale will actually raise instead of lower some of the rates in the West is shown in the following table, made up of rates which will not be reduced at all under the interim order, and which under the permanent adjustment will be equal to or higher than the present rates.

Miles	Present first-class rates			New rates (R. 359, 381)
	Zone I	Zone II	Zone III	
5	35	37	40	40
10	36	40	42	43
15	39	42	45	46
20	40	44	47	48
25	42	46		50
30	44	50		52
35	46	52		54
40	48	55		56
45	51	57		58
50	53			60
55	55			61
60	57			62
65	60			63
70	62			64
75	64			65
80	66			66

and a pro rata apportionment of the solely related constant costs.[73] These solely related constant costs rest as a burden upon the less-carload traffic taken as a whole, and cannot be apportioned on a cost-of-service basis to any particular segment or class of less-carload traffic. However, if for comparative purposes they were prorated on a ton and ton-mile basis against all less-carload traffic whether moved at first, second, third, or fourth class, it mathematically would follow that the low-rated third- and fourth-class traffic would inevitably make a less than average contribution per 100 pounds to such constant expenses, while the first-class and second-class traffic would make a greater than average contribution. The tables of the western carriers deal only with that portion of the less-carload class rate traffic which makes the lowest contribution.

Constant costs were treated by the Commission on the practical basis of determining the contribution which less-carload and passenger services made to constant costs, and then distributing the remainder of the constant costs as a burden which the carload traffic as a whole must bear if the various services, including the carload freight service itself, are to survive. The ultimate *rev-*

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[73] The argument that the costs figures omit common constant costs, and therefore only represent partially- and not fully-distributed costs, fails to mention the fact that on less-carload traffic in the West, the common constant costs amount to less than 6% of total costs (Ex. 13, R. 5933, 5972).

cnue problem as to less-carload traffic is not so much that of apportioning the constant costs, as it is of determining for each type of traffic that schedule of rates which, *considering its ability to pay,* will provide the greatest contribution to constant costs, while avoiding discrimination, and taking into account public policy and fair returns to the carriers as a whole. Indeed, a major costs witness for the western carriers took the position before the Commission that constant costs should not be distributed at all in making territorial comparisons, because constant costs cannot be assigned to specific operations (R. 4266–8, Ex. 196, R. 11330–1, 4352).

If the compensatory character of the less-carload traffic is considered as a whole, the less-carload solely related constant costs should also be considered, but the deficit tables do not consider less-carload traffic as a whole. They merely pick out third- and fourth-class less-carload traffic, within the one lowest rated zone, in one territory, and when the figures are unfavorable to them, they leave out the third-class rate comparison tables. No substantial amount of less-carload traffic moves below fourth class (Ex. 135, R. 9594), and the average class rate less-carload traffic in the West moves at a rate higher than the third-class rate (R. 1404).

The showing the western carriers attempted to make on the basis of increased costs in 1945 as compared with 1939 is vitiated by the figures on rates of return. In 1939, the rate of return of the western carriers was 1.65 per cent. Yet, in spite of the alleged 24 per cent increase in costs, their rate of return in 1944 was 4.17 per cent and in 1945 it was 5.71 per cent. Not only have they absorbed any price increases; they have made a great deal more money in spite of these price increases.

To correct the erroneous impressions which the tables of the western carriers attempt to create, the Government has caused to be prepared two charts, *which are set out opposite this page,* to reflect the effect of the Commission's order, not on a small segment of less-carload class rate traffic in one zone in the West, but on all class rate traffic in all the western zones involved, both less-carload and carload. These charts show in proper perspective the significance of the relationship between the rate adjustments and the costs of the service. All rates shown are those provided for in the Commission's ad interim 10 per cent order.

The first chart shows the out-of-pocket less-carload costs based on a 10-ton load, both with and without the adjustment for the alleged 24 percent increase in cost of materials and labor, allowing for 10 per cent circuity, and 10 cents per 100 pounds for less-carload pick-up-and-delivery service, because some of this less-carload traffic does not receive this service (R. 199).

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It will be observed that all but a very small segment of the class rate scales exceed by a substantial margin the out-of-pocket costs of handling the traffic. The excess of rates above out-of-pocket costs represents the contribution toward constant costs which is made by the less-carload operations as a whole, but which, in computing costs, is not capable of direct assignment on a cost-of-service basis to a particular segment of less-carload traffic, even the total class rate segment.[74]

The second chart shows the same relationship as to carload class rate traffic, using a representative 1939 boxcar load of 25 tons. No adjustment was made for the alleged 24 percent price increase between 1939 and 1945, because obviously the sharply increased rates of return of the western carriers demonstrate that any price increases were more than absorbed by more favorable operating conditions from the standpoint of the western carriers. This chart shows by what a wide margin the carload class rates exceed the carload costs in the West.

The Commission in these proceedings was trying to prescribe a rate structure to eliminate the

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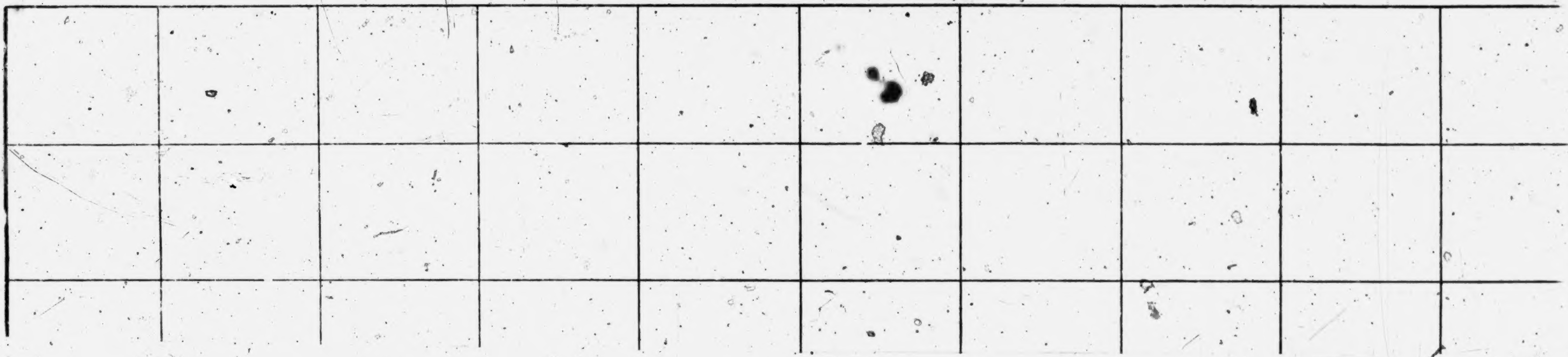
[74] However, in the Government tabulation mentioned on page 235, *supra*, it is demonstrated that the less-carload class rate traffic as a whole contributes more than its pro rata share of the constant costs solely related to less-carload traffic, even allowing for the alleged 24 per cent price increase.

Chart 1.– COMPARISON OF EDWARDS' LESS CARLOAD COSTS IN WESTERN DISTRICT WITH AD INTERIM CLASS RATES PRESCRIBED BY COMMISSION

(COSTS BASED ON PRESENT LOADING OF 10 TONS PER CAR AND WITH & WITHOUT OPERATING EXPENSES, RENTS, AND TAXES INCREASED 24 PERCENT. EXHIBITS 13 AND 195.)



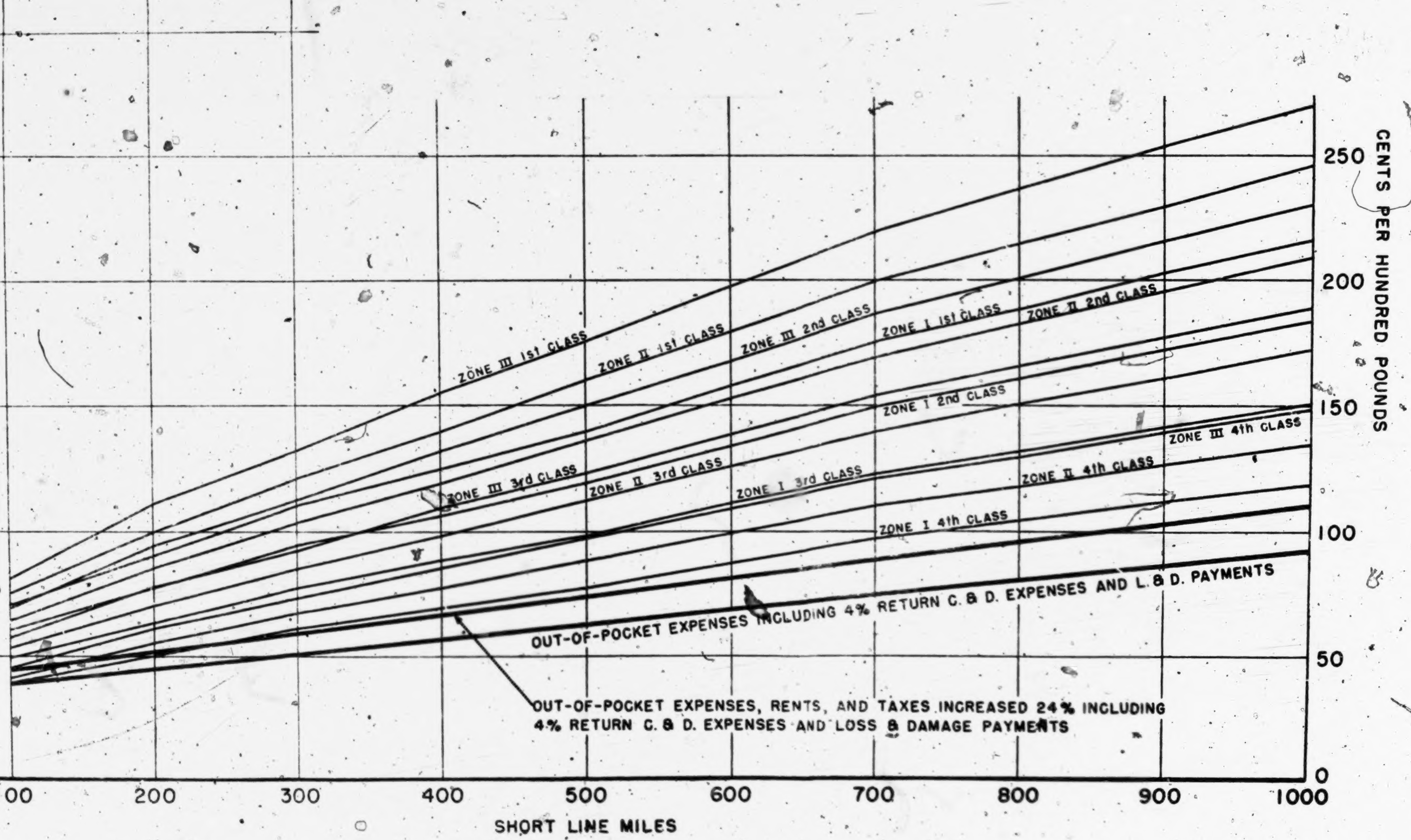
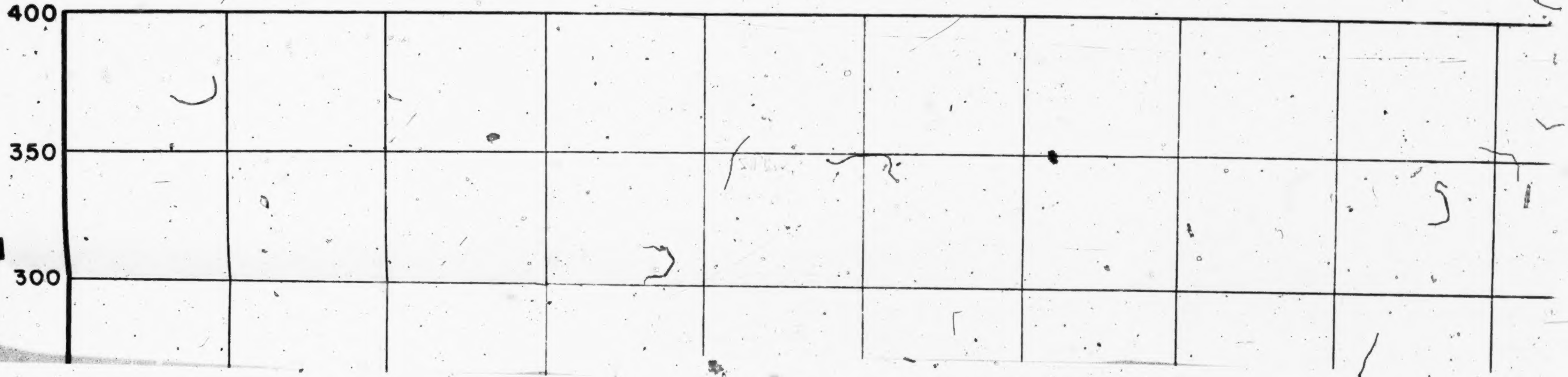
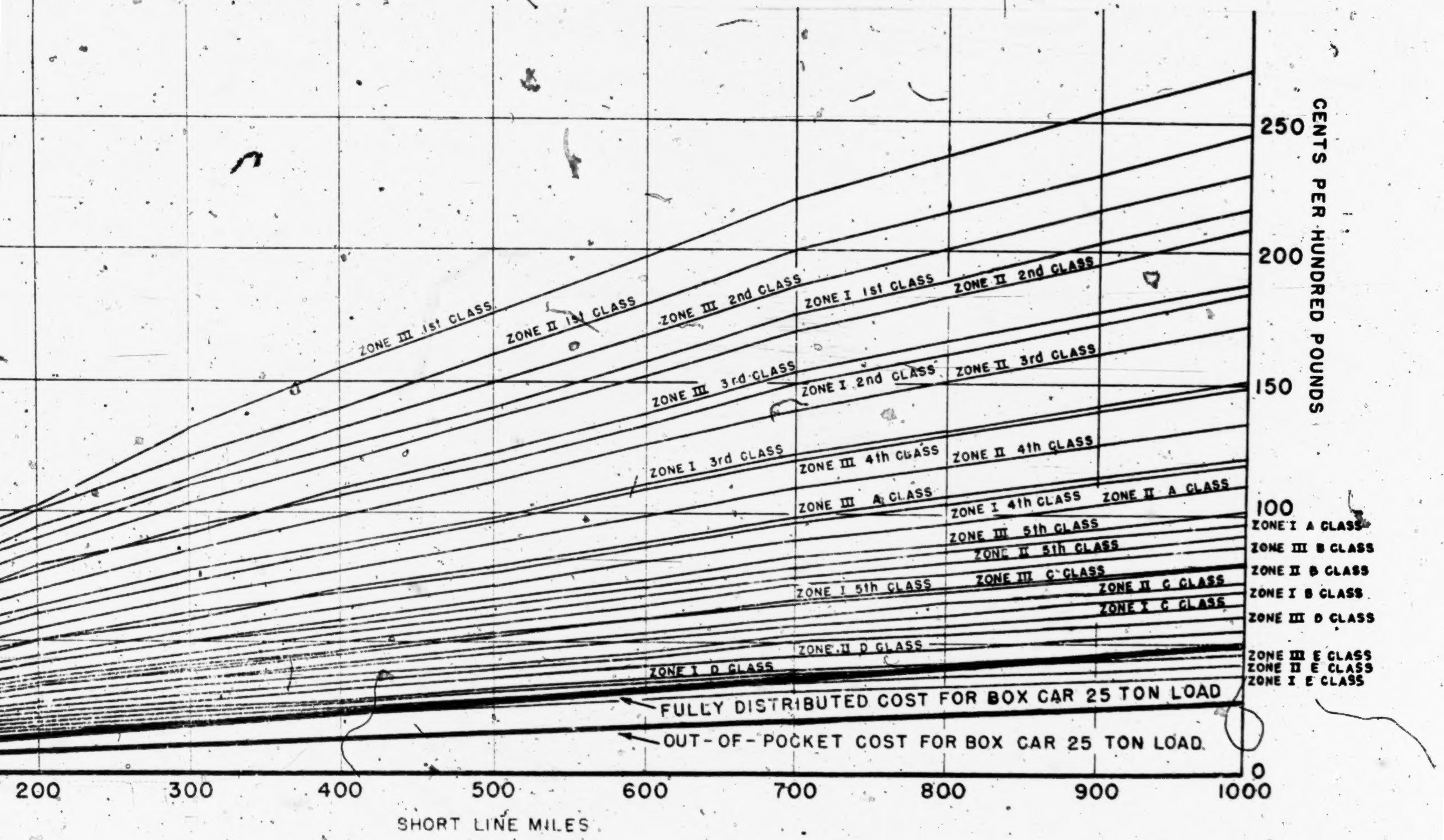

ZONE III 1st CLASS
ZONE II 1st CLASS
ZONE III 2nd CLASS
ZONE I 1st CLASS
ZONE II 2nd CLASS
ZONE I 2nd CLASS
ZONE III 4th CLASS
ZONE III 3rd CLASS
ZONE II 3rd CLASS
ZONE I 3rd CLASS
ZONE II 4th CLASS
ZONE I 4th CLASS
OUT-OF-POCKET EXPENSES INCLUDING 4% RETURN C. & D. EXPENSES AND L. & D. PAYMENTS
OUT-OF-POCKET EXPENSES, RENTS, AND TAXES INCREASED 24% INCLUDING 4% RETURN C. & D. EXPENSES AND LOSS & DAMAGE PAYMENTS
250
200
150
100
50
0
CENTS PER HUNDRED POUNDS
00
200
300
400
500
600
700
800
900
1000
SHORT LINE MILES

Chart 2.— COMPARISON OF EDWARDS' CARLOAD COSTS IN WESTERN DISTRICT WITH AD INTERIM CLASS RATES PRESCRIBED BY COMMISSION

(COSTS BASED ON REPRESENTATIVE LOAD OF 25 TONS IN BOX CARS. EXHIBITS 13 AND 195)




CENTS PER HUNDRED POUNDS
250
200
150
100
0
200
300
400
500
600
700
800
900
1000
SHORT LINE MILES
ZONE III 1st CLASS
ZONE II 1st CLASS
ZONE III 2nd CLASS
ZONE I 1st CLASS
ZONE II 2nd CLASS
ZONE III 3rd CLASS
ZONE I 2nd CLASS
ZONE II 3rd CLASS
ZONE I 3rd CLASS
ZONE III 4th CLASS
ZONE II 4th CLASS
ZONE III A CLASS
ZONE I 4th CLASS
ZONE II A CLASS
ZONE I A CLASS
ZONE III 5th CLASS
ZONE III B CLASS
ZONE II 5th CLASS
ZONE II B CLASS
ZONE III C CLASS
ZONE I 5th CLASS
ZONE II C CLASS
ZONE I B CLASS
ZONE I C CLASS
ZONE III D CLASS
ZONE II D CLASS
ZONE I D CLASS
ZONE III E CLASS
ZONE II E CLASS
ZONE I E CLASS
FULLY DISTRIBUTED COST FOR BOX CAR 25 TON LOAD
OUT-OF-POCKET COST FOR BOX CAR 25 TON LOAD

complicated and chaotic hodge-podges that had grown up in the several rate territories. Isolated differences in costs are bound to exist in the handling of traffic under any rate-making system based on what could properly be called a rate structure. If class-rate scales were adjusted to reflect all the minute differences in cost that exist within the different sections of the same carriers' lines, main line versus branch line, large terminal versus small terminal, one railroad versus another railroad, steep grade versus level track, number of bridges and tunnels, the result would be not a rate structure, but chaos.

Among the variable factors within the control of the carriers is circuity of routing. Exhibit 11 shows that freight traffic has a circuity range of at least from 1 to 46 per cent (R. 5700). No rate structure can be adjusted to deal with these circuity variations, but it can only be adjusted to *average* operating conditions, as has been done. This will always mean that some segments of the traffic will be more compensatory than others which move on the same rates, and this situation will always be extremely fluid.

As to less-carload traffic, loading is perhaps the most important variable factor within the control of the carriers. The witness Capron suggested that the Burlington might be forced by competition to go back to loadings of 1,000 pounds per car (R. 910). It is entirely up to the carriers to decide how far they will go in meeting competition, in terms of load, speed of service, and other factors. The Commission has no control in this field. If the Burlington can choose to load a car with only 1,000 pounds, after concluding, for a good reason or a bad reason, that this is in its best interests, there is nothing to prevent it, once O. D. T. emergency loading regulations are off, from loading only 100 pounds in a car. The Burlington's costs can thus be made not only a few per cent higher than Eastern costs, but several hundred or several thousand percent higher.

No rate structure can be made so compensatory as to take care of every variation in operating conditions which management in its judgment may choose to apply. To remove the losses on every item of traffic, in any size of shipment, would require an extremely complicated system of rates which would vary with every 50 or 100 pound change in the weight, and which would vary with the number of pieces carried, the number of interchanges, the length of the haul, and almost innumerable other factors. It would necessarily even result in different charges by individual competing carriers for identical shipments between the same points, as the costs of individual competing carriers for identical service sometimes vary by 15 per cent or more. (Ex. 2, R. 5178, 1558). In other words, for the

Commission to pursue the will-o'-the-wisp ideal of a rate structure which would insure that no shipment would ever move at less than cost and, at the same time, that the charge for no shipment would exceed cost and a fair rate of return, would call for a rate structure, if it could be called that, so complex that it would break down of its own weight.

No rate structure can make every shipment on every mile of each particular road move at a profit, or prevent some individual shipments from moving at rates which bring in far more than a fair rate of return. As stated by Mr. Justice Hughes in *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 600: "The rate-making power may be exercised in a practical way and * * * the legislature is not bound to assure a net profit from 'every mile, section, or other part into which the road may be divided.'" The distinction between deliberate discrimination directed at traffic in a particular commodity, on the one hand, and a complete rate structure covering all commodities, which may incidentally, *"in mere details,"* affect small segments of traffic adversely, is well explained by Mr. Justice Hughes, and is controlling in the case at bar.

A rate *structure* was what the Commission was dealing with. Appellants all concede, and even assert, that the Commission's order is a single, indivisible order ~~which~~ must stand or fall as a whole. The western carriers rest their case largely on the effect of the Commission's order on a minute segment of this broad rate structure (traffic "of minor importance," in the words of counsel for appellants in No. 343, Brief, p. 59), and ask this Court to nullify the painstaking 6-year labors of the Commission to bring order out of chaos in the rate structure of the United States. Surely this Court will not pursue that uninviting course, particularly when these western carriers have it almost completely within their own control to eliminate any fancied small inequities which they may feel will result from this monumental, unprecedented achievement in the field of rate making.

The new rates have never been given the test of experience, and unless proposed rates are conclusively proven to be inevitably confiscatory, it is the rule of this Court that they must be given a chance to work. *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 17; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54; *Minnesota Rate Cases*, 230 U. S. 352, 465; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 69. The court below has protected appellants by a dismissal without prejudice to a later suit after a fair test (R. 1450). See *Darnell* v. *Edwards*, 244 U. S. 564, 569.

There is one final reason why the confiscation evidence was fatally defective, as a matter of law;

namely, that it dealt with a group of carriers, and failed to indicate the effect of the new rates on any individual appellant-carrier.

The petition of appellants in No. 345 alleged that the Commission's cost studies showed that the new rates would be non-compensatory to them as a group, or collectively, in violation of the Fifth Amendment (R. 846–7). The petition was amended so as to make the confiscation allegation for each carrier separately, when the Court's attention was directed to the rule in *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440 (R. 863). But this amendment did not rectify the situation, for the *evidence* upon which the carriers rely was presented in terms of aggregates rather than with respect to each of the carriers. Such a showing was held not to be sufficient in the *Aetna* case. Confiscation allegations must be detailed and definite, and must clearly show that confiscation necess[illegible]ly follows from the facts alleged. *Louisville & [illegible]shville R. Co.* v. *Garrett*, 231 U. S. 298; *Aetna Insurance Co.* v. *Hyde*, *supra*; *Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U. S. 74; *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470.

The appellant carriers contend that if it was proper for the Commission to make group comparisons, it was proper to show by group evidence that the present rates of each carrier are lawful and that the newly prescribed rates would be confiscatory. This contention is not sound.

Nor is it sustained by the footnote to the Court's opinion in *North Carolina* v. *United States*, 325 U. S. 507, relied on below.

The Commission's practice in considering group comparisons was examined and approved in the *New England Divisions Case*, 261 U. S. 184. There an attack was made upon an order of the Commission because divisions were fixed between groups of carriers without considering the carriers individually. This Court held that the Commission's order was based upon group comparisons which it assumed were typical in character and ample in quantity to justify the finding in respect to each division of each rate of every carrier. In that connection, the Court said (p. 197):

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also

that the Commission had been confronted with similar situations in the past and how it had dealt with them.

The Court held further that Congress may, consistently with the due process clause, create rebuttable presumptions. In commenting upon the power of Congress, the Court said (p. 199):

> * * * It might, therefore have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, serious injustice to any carrier could be avoided, by availing of the saving clause which allows any one to except itself from the order, in whole or in part, on proper showing.

It will be observed that the group comparison method provides the only practicable method by which the Commission may undertake an extensive rate investigation. But the carriers are not harmed by this method. The right of each carrier is protected by permitting it to rebut the presumption that average conditions are typical of its traffic and operating conditions. In effect, the findings of unlawfulness are made separately as to each carrier, based upon evidence of averages which the Commission deems to be typical. And each carrier is fully protected by a saving clause of the kind mentioned in the last quotation, which appears in the Commission's supplemental report (R. 477). See also *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 772; *United States* v. *Louisiana*, 290 U. S. 70, 77.

(B) *The confiscation evidence should not have been received by the court below*

Appellants in No. 345 insist that their confiscation evidence was properly admitted under the doctrine of *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349. But this Court has clearly and frequently indicated that it prefers to have the benefit of the Commission's judgment upon technical questions before passing upon constitutional questions. Thus, in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, the Court said (pp. 489–490):

> * * * correct practice requires that, in ordinary cases, and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Commission, and that a suit to set aside or

> annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties. * * * Hence, we cannot approve of the course that was pursued in this case, of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory. * * *

This rule was followed in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, and approved specifically in the *Baltimore & Ohio* case. Although the Court, in the *Baltimore & Ohio* case, approved the action of the district court in receiving new evidence on confiscation, its approval was predicated upon the Commission's refusal to receive evidence offered on the question of confiscation. The Court said:

> * * * Prior to the taking effect of the order, appellants filed a petition for rehearing in which they claimed that its enforcement would confiscate their property; they then made substantially the same contentions as they make in this suit and sought opportunity to support them by evidence in order to obtain the commission's findings of fact and decision upon the question of confiscation. But the commission denied their application. * * * The appellants were not given and could not obtain a hearing before the commission upon the question of confiscation. * * * Appellants conformed to practice appropriate and desirable as indicated in *Manufacturers*

> *Ry. Co.* v. *United States*, 246 U. S. 457, 489, and recently expounded in *St. Joseph Stock Yards Co.* v. *United States*. 298 U. S. 363, 372–373.

Mr. Justice Brandeis, joined by Mr. Justice Stone, Mr. Justice Roberts, and Mr. Justice Cardozo, disagreed with the majority of the Court on the admissibility of the evidence (298 U. S. at 392):

> In passing upon the issue of confiscation the Court discussed the question, whether the trial court properly admitted evidence which had not been introduced before the Commission; and decided that the evidence was admissible. I do not agree with the Court's conclusion on that subject. * * *

Appellants do not allege that the Commission erred in refusing to receive evidence on the question of confiscation, or that they offered to adduce such evidence before the Commission. On the contrary, in their petition for "reopening, reargument and reconsideration," filed with the Commission after entry of the order of May 15, 1945, the western carriers not only did not request an opportunity to introduce evidence on the question of confiscation, but they affirmatively advised the Commission as follows (R. 12681):

> There is no necessity for rehearing in this proceeding as long as the issues are restricted to the territory originally involved; this for the reason that the record

> as made by respondent carriers in the Western District was as complete as it was possible to present.

When they made that statement, the western carriers knew the level of the prescribed new rates, and were in a position to ascertain the effect of the rates on their revenues. They should not be permitted to advise the Commission that the "record as made by respondent carriers in the Western District was as complete as it was possible to present," and then to contend in the District Court and here to the contrary—on "a belated offering of evidence in support of a belated contention." 298 U. S. 388.

Finally, it is submitted that the better view is that administrative remedies must first be exhausted before appeal to a court, even on a constitutional question. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41. The *Myers* case seems to be an adoption by the Court of the sound view so long advocated by Mr. Justice Brandeis, that the administrative process cannot be adequately and effectively carried on unless the administrative tribunal is given an opportunity, in the first instance, to learn all the facts militating against its prospective orders. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73. There is nothing in this doctrine which would deprive a litigant of any substantive right which the majority of the Court in the *Baltimore & Ohio* and *St. Joseph Stock*

Yards cases indicated it was trying to protect, namely, the right to have a judicial tribunal consider all the evidence pertinent to the constitutional issue. The Court will have as much opportunity to consider such evidence if it is first introduced before the administrative tribunal as it would have if the evidence were held back and first introduced before the Court. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. If our view of the *Myers* case is the correct one, it is submitted that it would be desirable for this Court to clarify this point now.

(C) *Effect of changes in conditions since the Commission's decision—Ex parte 162*

All the appellants have so much to say in their briefs about the effects of the Commission's decision in the general rate increase case, *Ex Parte 162*, decided December 5, 1946, not yet reported, that it becomes necessary to straighten out some possible misconceptions that might be created about the effects of this decision.

One effect of the decision is, of course, to destroy much of the force of the confiscation argument of the western carriers, because all of the less-carload rates set out in their deficit ~~comparisons in~~ their brief are raised 20 per cent.

The western carriers attempt to overcome this obstacle to their confiscation argument by asserting that the rate increases allowed to them in *Ex Parte 162* only take care of increases in expenses subsequent to January 1, 1946, and on the basis of this premise, they flatly assert that their less-carload rates are now more confiscatory, even with the *Ex parte 162* increases, than they were on the basis of the 1939 figures. The facts are these: (a) The Commission in *Ex Parte 162* gave the western carriers substantially all the increase in rates they asked for, or showed any need for; and (b) the greater volume of traffic, and more efficient utilization of facilities, more than compensated the western carriers for their increases in expenses between 1939 and January 1, 1946, as evidenced by their greatly improved rates of return throughout the war years (p. 179, *supra.*)

The argument that changes of conditions subsequent to the Commission's decisions invalidate those decisions has been rejected time after time by this Court (pp. 211–12, *supra*). To make such an argument in this case is particularly inappropriate. The problem of territorial rate structures and rate relationships is one thing. The problem of price levels and wages is another. Rate structure adjustments can only be accomplished after lengthy, exhaustive investigations. By contrast, changes in revenue needs can arise unexpectedly and frequently, just as *Ex Parte 162* was claimed by the carriers to be an emergency situation, requiring an enormous rate increase on one day's notice and without a hearing.

Since the decision in the case at bar, the Commission has granted the large rate increases in *Ex Parte 162,* the passenger fare increases involved in the same decision, and the nationwide express increases in *Ex Parte 163,* decided October 28, 1946, not yet reported. The Commission also, in 1946, launched two new nationwide investigations into the problem of less-carload shipments—Docket No. 29555, to inquire into the practice of the railroads of granting what amounts to free pick-up-and-delivery service at the line-haul rate on less-carload shipments, and No. 29556 to inquire into all the rates, revenues, costs, and other conditions involving all small shipments by railroad, with principal emphasis on less-carload shipments of under 300 pounds each.

Problems directly related to revenue needs, which arise from changes in conditions, principally traffic, wage, and price levels, are matters of continuous concern to the Commission. They should be settled as revenue cases and not as territorial rate structure problems or discrimination problems. Revenue adjustments can be superimposed on the class rate structure now, as they have been in the past. The question of territorial rate structures and territorial discrimination should be handled on its own merits, and the problem of revenue needs handled on its own merits.

The three groups of appellants have different contentions about the effects of the decision in *Ex Parte 162,* but what has been said above is believed to be an adequate answer to the contentions made in Nos. 344 and 345. There is one further contention advanced in No. 343, to the effect that *Ex Parte 162* makes the new permanent uniform rate scale a relic, on the theory that it is uncertain whether that new scale is to be increased 20 per cent or 25 per cent. The answer is that the new scale is an independent scale in terms of dollars and cents by mileage blocks, and when it goes into effect, it will supersede whatever scales of class rates are then in effect. Of course, the new scale is not in issue here. It has not been ordered into effect, but is to wait on the completion of the new uniform classification, which in itself may have an important effect on the necessary level of rates at that time (e. g., if the new classification pushes most ratings up to first class, it would be proper to have a lower level of rates than would be required if the new classification substantially depresses most ratings from their present levels). If, at that future time when the new classification is ready, it becomes necessary to adjust the permanent scale upward or downward, in dollars and cents, the Commission can readily accomplish this, in the light of conditions then existing, preserving the scheme of the scale and changing only its level in dollars and cents.

* * * * *

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted.

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WENDELL BERGE,
Assistant Attorney General.
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FEBRUARY 1947.

APPENDIX A

Section 1 of the Interstate Commerce Act (Feb. 4, 1887, 24 Stat. 379, 49 U. S. C. Sec. 1, as amended) contains the following paragraphs:

> (4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.
>
> (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service

or any part thereof is prohibited and declared to be unlawful.

(6) It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 3 (1) of the Interstate Commerce Act, as amended, particularly by the Act of September 18, 1940, 54 Stat. 902, provides as follows:

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular descrip-

tion of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadavantage to the traffic of any other carrier of whatever description.

Section 13 of the Interstate Commerce Act contains the following paragraphs:

> (3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-mak-

> ing authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.
>
> (4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15 of the Interstate Commerce Act contains the following paragraphs:

> (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing

made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

* * * * *

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Section 15a of the Interstate Commerce Act, added February 28, 1920, 41 Stat. 488, as amended

June 16, 1933, 48 Stat. 220, and September 18, 1940, 54 Stat. 912, provides as follows:

> (1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Section 5 (b) of the Transportation Act of 1940, known as the Ramspeck resolution, 54 Stat. 902, 49 U. S. C., note following Sec. 3, provides as follows:

> The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended [this chapter], for the purpose of determining whether said rates are unjust and unreasonable or unlawful

> in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: *Provided,* That the Commission in its discretion may confine its investigation to such manufactured products, agricultural commodities, and raw materials, and the rates thereon as shippers thereof may specifically request be included in such investigation.

The National Transportation Policy as declared in the Transportation Act of 1940, 54 Stat. 899, 49 U. S. C., note preceding Sec. 1, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway,

and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPENDIX B[1]

CANNED GRAPEFRUIT, CARLOADS, FROM WINTER HAVEN, FLORIDA, TO BUFFALO, NEW YORK

(A). 1. In attempting to ascertain the applicable all-rail rate on canned grapefruit, carloads, from Winter Haven, Florida, to Buffalo, New York, a shipper whose plant is on the Atlantic Coast Line Railroad would logically first look at the "Tariff Index" filed by that carrier with the Interstate Commerce Commission as ICC No. B-3126.

2. After examining the seven separate sections of this Index, the user concludes that Agent R.

---

[1] In order to follow this process through, the following documents are necessary (on file with the Commission):

Robert E. Boyle, Southern Classification No. 60, I. C. C. No. 102.

W. S. Curlett, Tariff No. 44-I, I. C. C. A.-800.

W. S. Curlett, Exceptions to Southern Classification, I. C. C. No. 141-A.

W. S. Curlett, Tariff, I. C. C. No. A-786.

W. S. Curlett, Exceptions to Southern Classification, No. 141-B, I. C. C. No. A-838.

W. S. Curlett, Tariff, I. C. C. No. A-797.

W. S. Curlett, Tariff, I. C. C. No. A-755.

A. H. Greenly, Official Classification No. 61, I. C. C.-O. C. No. 61.

R. H. Hoke, Canned Goods Tariff, I. C. C. No. 974.

B. T. Jones, Exceptions to Official Classification, I. C. C. No. 3926.

B. T. Jones, Exceptions to Official Classification, I. C. C. No. 2446.

I. C. C. Tariff Index, I. C. C. No. B-3126.

H. Hoke's Canned Goods Tariff, ICC No. 974, as referred to on page 8, Section 1 of the Index, will probably publish a through rate on canned grapefruit from Winter Haven to Buffalo, because that tariff applies from Florida to New York points. An examination of that tariff reveals that no through rates are published therein on canned grapefruit from Winter Haven to Buffalo.

3. The tariff user then goes back to the Tariff Index for another search. By reference to page 31 of Section 1 of the Index, he finds that Agent W. S. Curlett's Tariff No. 44–I, ICC No. A–800, publishes class and commodity rates between points in New York and points in Florida. Also he gets a copy of this tariff book, which is one of thousands of similar books similarly filed.

4. The title page of Agent Curlett's ICC A–800 indicates that the rates published therein are governed by Southern Classification No. 60, Agent Robert E. Boyle's ICC No. 102, together with exceptions to the Southern Classification as indicated in Item No. 5 of Curlett's ICC A–800.

5. The Tariff user now examines the "Table of Contents" as shown on page 5 of the tariff and reference is found to "Commodities, index of." Reference is there made to page 16 of the tariff. An examination of this index discloses that canned grapefruit is not included therein, thus indicating that there is no commodity rate available for his use.

6. The tariff user then refers back to Item No. 5, which is found on page 180 of Curlett's Tariff ICC A–800, to see if an exception rating is avail-

able. This item refers to Section 1 of Agent W. S. Curlett's Exceptions to Southern Classification, No. 141-A and to Item 620, page 193, for explanation thereof. Item 620 refers to Agent Curlett's ICC No. A-786. The latter tariff, when procured, is discovered to have been cancelled by Curlett's Tariff No. 141-B, ICC No. A-838, effective April 20, 1946.

7. The tariff user then examines Agent Boyle's Southern Classification No. 60, ICC No. 102, to find the classification rating and the packing and shipping regulations, and finds that "canned grapefruit" is listed therein under the generic heading of "foodstuffs" on page 278. Item 18430, page 278, authorizes a rating of Class 7 on "fruit, canned or preserved, in metal cans, in boxes, carload minimum 36,000 pounds."

8. The tariff user then goes back to Agent Curlett's Exceptions to Southern Classification, No. 141-B, ICC A-838, and finds that "canned grapefruit, carloads," is included in Item 18147½, page 158, because it is one of the commodities described in Note 34, page 99. This Item (18147½) provides two "exception" ratings on "canned goods", including canned grapefruit, namely, Class 30-K and Class 35-K. The former rating has a prefix symbol resembling a clover leaf, the explanation thereof placing the tariff user on notice that such rating is applicable only from "Southern Stations to Northern Stations." The latter rating has a prefix symbol resembling an inverted ship's anchor. The explanation of this symbol places the tariff user on notice that this rating is applicable only from "Northern Stations

to Southern Stations." The explanation of the terms Northern Stations and Southern Stations is found by referring back to the Table of Contents on page 2, wherein reference is made to page 78 for "Terms, Explanation of." To discover the meaning of these terms, the tariff user goes back to Agent Curlett's ICC No. A–800 and reviews pages 17 to 173.

9. The tariff user has now progressed to the point where it appears that his rate on canned grapefruit from Winter Haven to Buffalo is probably "Class 30–K." The exception rating of "Class 30–K" takes precedence over the Classification rating of "Class 7" by virtue of paragraph (a), Section 1, title page 110 of Curlett's ICC A–838. He therefore goes back to Agent Curlett's ICC A–800 and attempts to ascertain the Class 30–K rate. He finds, on page 116, Winter Haven as an origin point on the Atlantic Coast Line Railroad, "Index 9600," taking "Winter Haven" rates under "Section 1." He then locates Buffalo, New York, on page 43, taking "Buffalo" rates under Section 1. Referring to page 224, he finds two "Rate Basis" numbers as applying "between" Winter Haven and Buffalo under the column headed "A. R.", which means "all rail." Rate Basis No. 306 is subject to a reference symbol, 184, while Rate Basis No. 289 is subject to a reference symbol 185. To ascertain what these references mean, the tariff user refers to the Table of Contents on page 5 of the tariff, where reference is made to pages 174 to 176 for "explanation of reference marks." He there finds that Rate Basis No. 306 is, by the explanation of reference symbol 184:

> "Applicable as follows:
>
> (a) On all Commodities, except as provided for in 185.
>
> (b) On Canned Goods, northbound, as described in Item 18147½ of Agent W. S. Curlett's Tariff No. 141–A (See Item No. 620), and on Vegetable Plants as described in Item No. 33620 of Agent W. S. Curlett's Tariff No. 141–A (See Item No. 620), subject to the provisions of Note 26."

Note 26 which appears on page 179 reads, in part, as follows:

> NOTE 26.—Where reference is made hereto: On Canned Goods, apply the Class 30K rates less the amounts shown in Column A below.

When from stations shown on pages 96 to 173, inc., subject to rate basis names	In cents per 100 pounds	
	Column A	* *
FLORIDA		
* * *		
Winter Haven	5	* * *
	* * *	* * *

He finds that Rate Basis No. 289 is not, by the explanation of reference symbol 185, applicable on "canned grapefruit."

10. The tariff user has now learned that his rate on canned grapefruit from Winter Haven to Buffalo is "Class 30–K" obtained by use of Rate Basis No. 306, less 5 cents per 100 pounds as authorized in Note 26. He then looks up the Class 30–K rate opposite Rate Basis No. 306, which appears in Section 3, page 399, as 87 cents per 100 pounds. By deducting 5 cents from 87

cents, a rate of 82 cents is obtained which is the all-rail rate on canned grapefruit, carload, from Winter Haven to Buffalo, effective as of December 1, 1946, exclusive of *Ex Parte* Nos. *148* and *162,* general freight rate increases of 1946.

(B) 1. Page 340 (Title page of Section 3) of Agent Curlett's ICC A-800 provides "for alternative application of combination rates, see Rule as shown in Item No. 10", appearing on page 180 and quoted below:

> APPLICATION OF RATES
>
> *Item No. 10. Alternative application of combination rates*
>
> (a) (Not applicable in connection with Joint Motor-Rail Routes).
>
> The following rules apply only after the charge from point of origin to destination has been determined under the provisions of Sections 1, 2, 3 or 4 of this tariff.
>
> If the charge based on the aggregate of intermediate local, joint or proportional rates named in tariffs lawfully on file with the Interstate Commerce Commission over any route via which the through rates named in this tariff, as amended, apply, is lower than the charge accruing under the through rates published in tariff, from origin to destination, such lower charge will be the legal charge to apply via the route over which said lower aggregate of intermediate rates is applicable.
>
> (b) (Applicable only in connection with Joint Motor-Rail Routes). * * *

2. By the provisions of Item 10, quoted above, the tariff user is placed on notice that if he can

find a combination of rates from Winter Haven to Buffalo that produces a lower rate than the through rate of 82 cents he is entitled to such lower rate. In seeking a rate from Winter Haven to Buffalo in Agent Hoke's Canned Goods Tariff, ICC No. 974, he recalled that such tariff published specific commodity rates on canned grapefruit from Winter Haven to various gateway points intermediate to Buffalo, like Cincinnati, Ohio; Kenova, West Virginia; and Lynchburg, Roanoke, Richmond, and Norfolk, Virginia, to which points a commodity rate of 50 cents per 100 pounds (exclusive of Ex Parte 148 increase) is published. This rate is subject to a minimum weight of 60,000 pounds to Cincinnati and Kenova and 36,000 pounds to the other points.

3. By a process and procedure similar to the foregoing, the tariff user discovers that there are no specific commodity rates on canned grapefruit, carloads, from the above named border points to Buffalo. The class rates are governed by Official Classification No. 61, Agent A. H. Greenly's ICC–OC No. 61 which prescribes a rating of "Class 5" on canned grapefruit, carloads. The class rate tariffs applicable from these border points to Buffalo are governed by the Official Classification No. 61 and by "Exceptions to Official Classification" as published in Agent B. T. Jones' ICC No. 3926 and Agent W. S. Curlett's ICC A–797.

These "Exceptions" authorize a rating of Class 32–S on canned grapefruit, carload minimum weight 36,000 pounds. See Supplement

102, page 46, Item 3480–D of Agent B. T. Jones' ICC 3926 and Supplement 85, page 13, Item 2830–C of Agent W. S. Curlett's ICC A–797. The following results are obtained:

From—Winter Haven, Fla. To—	① Rate	To—Buffalo, N. Y. From—	① Rate	Total ① rate
Cincinnati, Ohio	[a] 50	Cincinnati, Ohio	[b] 34	84
Kenova, W. Va	[a] 50	Kenova, W. Va	[b] 34	84
Roanoke, Va	[a] 50	Roanoke, Va	[c] 42	92
Lynchburg, Va	[a] 50	Lynchburg, Va	[c] 41	91
Richmond, Va	[a] 50	Richmond, Va	[c] 40	90
Norfolk, Va	[a] 50	Norfolk, Va	[c] 42	92

Explanation of references: ① Exclusive of Ex Parte 148 increase. Rates in cents per 100 pounds.

Tariff Authorities: [a] Agent R. H. Hoke's ICC No. 974 (commodity rate); [b] Agent B. T. Jones' ICC No. 2446 (class 32-S); [c] Agent W. S. Curlett's ICC A–755 (class 32–S).

The above computations indicate that the through rate of 82 cents cannot be reduced by the aggregate of intermediates provision of Item 10 of Agent Curlett's Tariff ICC No. A–800. However, in another case it might have been, and the careful shipper will make the search.

(C) The foregoing study and conclusions relate to the rate and tariff situation existing as of October 1, 1946, exclusive of the 1946 general rate increases. Later, the following occurred:

1. In October, in Supplement No. 52 to Agent Curlett's ICC A–800, reference symbol 185 was amended so as to apply on "canned grapefruit" as described in Item 1042 of the tariff effective December 2, 1946. However, the latter item did not become effective.

2. In Supplement No. 56 to Agent Curlett's ICC A–800, published in November, Item 1042–A, effective December 2, 1946, is as follows:

ARTICLES TAKING COMMODITY RATES COLUMN

Apply rates shown in Section 3 resulting from Rate Base Number in Section 1 and Section 2 (except as otherwise indicated)

Item No.	Commodity	Commodity rate column
1042-A cancels 1042.	Canned citrus fruit, canned citrus fruit juice (not frozen), or papaya fruit products, not frozen, viz: Juice, unfermented (not including Papaya Juice concentrate); pulp, unfermented; ** in earthenware or glass packed in boxes, in metal cans in boxes, in pails or tubs in crates, or in bulk in barrels, in straight or mixed carloads;	
	(a) Minimum weight 36,000 pounds	30K
	(b) On weight in excess of 45,000 pounds, ***	80% of 30K

Applicable only from Southern Stations, taking Index Nos. *** A. C. L. *** 8770 to 10195' *** S. A. L. *** 5080 to 6415; *** to Northern Stations.

Page 118 of tariff, Winter Haven ACL Station takes No. 9600.

Page 118 of tariff, Winter Haven SAL Station takes No. 6185.

3. This item (1042–A) had the effect of publishing the former "Class 30K" exception rating as a commodity column rating of "Column 30K" which removes the application of the former "exception rating" of Class 30K as per Items 600 and 605 of Curlett's ICC A–800 which read as follows:

> "RULES GOVERNING TARIFF
>
> "*Application of class rates*
>
> "*Item No. 600:*
>
> "In the absence of commodity rates on articles given class ratings in the governing classification or exceptions thereto, apply rates for corresponding ratings under the heading 'Classes' published herein. Such rates are subject to the rules of this tariff and the rules of the governing classification or exceptions thereto applicable to class rates." See also Rule 38, page 144 of Consolidated Freight Classification No. 17 (Agent Robert E. Boyle's ICC 102).

"*Application of commodity rates*

"*Item No. 605:*

"(a) On commodities assigned 'Commodity Rate Column' numbers in this tariff, apply rates for corresponding numbers under the heading 'Commodity Rate Columns' published herein.

"(b) Commodity rates on the articles specified in this tariff, are subject to the descriptions (including packing requirements), estimated weights, and all other rules of the classification and exceptions thereto, which govern the class rates from and to the same points, unless it is provided in connection with the individual items that said classification provisions will not govern."

4. The "Column 30-K" rate from Winter Haven to Buffalo, exclusive of the 1946 general increases, is therefore obtained by use of Rate Basis No. 289, which produces a rate of 83 cents per 100 pounds. This rate became effective on December 2, 1946 and is subject to a minimum weight of 36,000 pounds and is applicable on quantities not in excess of 45,000 pounds. On quantities (in the same shipment) in excess of 45,000 pounds the rate is "80% of 30-K", indicated in a table at the bottom of page 3, Supplement No. 52 of Curlett's ICC A-800, as being 66 cents when the "Column 30-K" rate is 83 cents.

(D) This illustration was referred to at page 141 of this brief, in connection with the proposition that the class rates have become obsolete through disuse, and have been largely replaced by special rates, i. e., exceptions, commodity rates, or column rates. Under the new permanent rate and classification structure contemplated by the Commission, a single classification and a single scale of class rates would govern all shipments except where special rates were found to be absolutely necessary. In other words, exceptions would really be exceptions, and the class rates would move the freight except in very unusual situations, rather than moving it only in very unusual situations, as now. Thus the Commission would give the shipping public and the carriers some relief from the absurd, intolerable, and wholly unjustified tariff complexities that have replaced the class rates.

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